153 U.S. 199

153-199

RECORD, CASE No. 14,232.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 227.

THE BRADLEY FERTILIZER COMPANY, APPELLANT,

vs.

THE SCHOONER "EDWIN I. MORRISON," HER TACKLE, &c.—STEPHEN S. LAVENDER ET AL., CLAIMANTS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 9, 1890.

RECORD, CASE No. 14,232.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 227.

THE BRADLEY FERTILIZER COMPANY, APPELLANT,

vs.

THE SCHOONER "EDWIN I. MORRISON," HER TACKLE, &c.—STEPHEN S. LAVENDER ET AL., CLAIMANTS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Caption	1	1
Libel filed in district court	1	1
Charter-party	6	3
Answer filed in district court	8	4
Interlocutory decree in district court	12	6
Amendment to interlocutory decree in district court	13	6
Final decree in district court	13	6
Claimants' notice of appeal to circuit court	16	8
Claimants' petition of appeal to circuit court	17	8
Hearing in circuit court	20	10
Libellant's requests as to findings of fact	20	10
Libellant's requests as to conclusions of law	21	11
Findings of fact	22	11
Conclusions of law	32	16
Order amending findings of fact	32	17

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MAY 17, 1893.

	Original.	Print.
Exceptions of libellant	37	19
Bill of exceptions	44	22
Testimony of Stephen S. Lavender	44	22
Robert S. Bradley	62	32
George W. Roseveit	62	33
Herbert Lawrence	66	35
Thomas H. Morton	68	36
Jans Willetsen	71	38
Elizur H. Atwood	75	40
William A. Cohoon	82	44
Charles G. Peterson	100	55
Belcher T. Thurlow	104	57
James E. Brett	113	62
Belcher T. Thurlow (recalled)	117	65
Elizur H. Atwood (recalled)	118	65
Charles G. Peterson (recalled)	120	66
William A. Cahoon (recalled)	121	67
Herbert Lawrence (recalled)	123	68
Thomas H. Morton (recalled)	125	70
Thomas H. Laird	129	72
John Power	132	74
George M. Cook	135	75
Stephen S. Lavender	152	85
Maria Y. Lavender	163	91
Libellant's Exhibit B—Extracts from log	167	93
B^2—Bill of lading	180	105
I—Declaration and protest	181	106
Testimony of R. G. F. Candage	185	109
Judge's certificate	193	114
Opinion of Judge Brown, March 30, 1886	195	114
Opinion of Judge Brown, July 12, 1888	203	118
Opinion of Judge Lacombe, October 24, 1889	206	120
Opinion of Judge Lacombe, December 18, 1889	209	121
Final decree	212	122
Appeal to the Supreme Court of the United States	215	123
Order as to amount of security on appeal	218	124
Clerk's receipt for amount of security on appeal	220	125
Citation	222	125
Clerk's certificate	224	126

1 Circuit Court of the United States, Southern District of New York.

THE BRADLEY FERTILIZER COMPANY, Libellant & Appellant,
vs.
THE SCHOONER "EDWIN I. MORRISON," HER TACKLE, ETC.—
STEPHEN S. LAVENDER *et al.*, Claimants and Appellees.

The libel in this case was filed in the district court of the United States for the southern district of New York on the 20th of March, 1884, and was as follows:

District Court of the United States for the Southern District of New York. In Admiralty.

To Honorable Addison Brown, judge of said court:

The libel of the Bradley Fertilizer Company, a corporation duly established by the laws of the Commonwealth of Massachusetts and located in Boston, in said Commonwealth, against the schooner "Edwin I. Morrison," of Boston, of about 507 tons burden, her tackle, apparel, and furniture, whereof Stephen S. Lavender is or lately was master, in a cause of affreightment and contract, civil and maritime; and the libellant alleges and articulately propounds as follows:

2 First. Heretofore, to wit, on the 19th day of December, A. D. 1883, the libellant made and concluded in Boston with Stephen S. Lavender, master and agent of said schooner "Edwin I. Morrison," a written contract of charter, in and by which the libellant chartered the whole of said vessel for a voyage from Weymouth, Massachusetts, to Savannah, Ga., and agreed to furnish to her a full and complete cargo of guano in bags and or bulk, and to pay for the use of said vessel during the voyage aforesaid one dollar and twenty-five cents ($1.25) per ton of 2,240 lbs., and load, trim, and lay the dunnage free of expense to the vessel, and said schooner, her owners and master, therein and thereby, among other things, agreed that said vessel should be tight, staunch, strong, and every way fitted for such a voyage, and to receive on board said schooner said cargo for said voyage; and thereupon it became and was the duty and obligation of said schooner, her owners and master, properly and carefully to navigate said schooner to said port of Savannah, and properly to protect said cargo on the voyage, and deliver it in safety in Savannah, the dangers of the sea mutually excepted. A true copy of said charter-party is hereto annexed and made a part of this libel.

Second. Thereafter, on or about the first day of January, 1884, the libellant under said charter-party shipped on board said schooner, in Weymouth, Massachusetts, in good order and condition, a full and complete cargo of guano in bags and or bulk, as agreed, owned by the libellant and loaded trim, and laid the dun-

nage free of expense to the vessel, the same to be carried in
3 said vessel to and delivered at Savannah, Ga., to the libellant or its agent, and bills of lading in the usual form for the carriage and delivery of said cargo were signed by said master and given to and are now owned by the libellant.

Third. Thereafter, to wit, on the fourth day of January, 1884, said schooner, with said cargo on board, having come to Boston from Weymouth, sailed from said port of Boston for Savannah, and upon arrival there, about the twenty-seventh day of said January, delivered her cargo, or so much of it as then remained, in a damaged condition, as hereinafter alleged, and was paid freight due thereon.

Fourth. Said schooner when she left said Weymouth and before, as the libellant is informed and believes and alleges, was not tight, staunch, strong, and every way fitted for said voyage as agreed, and on said voyage was not properly and carefully navigated, as was the agreement and duty of said schooner, her owners and master, and said cargo was not properly taken care of and protected on said voyage and was not delivered in safety and in good order and condition in Savannah, although no danger of the sea prevented, but, on the contrary, as the libellant is informed, believes, and alleges, the cap was gone from off the bilge-pump hole on the port side of said schooner, or was then so loosely, insecurely, and negligently fastened and screwed that the same worked and came off without any danger of the sea interve-ing, whereby said vessel was unseaworthy and unfit for said voyage, or after leaving port said cap was removed and not properly and securely replaced and screwed down, or was neg-
4 ligently and improperly loosened and left insecure by those in charge of said schooner, so that by the unseaworthiness of said schooner or by the negligence and improper navigation of those in charge of her said cap came off from said pump-hole without any danger of the sea, and said pump-hole and the hold of said schooner were thereby opened and exposed to the admission of great quantities of water, owing to which and to the unseaworthiness of said schooner and the negligent acts and omissions of those in charge of her navigation while on said voyage a large quantity of sea water, to wit, about seven feet, was admitted through said pump-hole into the hold of said schooner and into and upon said cargo, greatly wetting, damaging, and destroying it.

Fifth. By reason of the unseaworthiness and unfitness of said schooner, and of the negligence and acts aforesaid and the consequent admission of water into the schooner's hold, said cargo was greatly wet and thereby damaged and destroyed to a large extent, to wit, to the amount or value of eight thousand dollars ($8,000).

Sixth. Said schooner Edwin I. Morrison is now at Brooklyn, in said southern district of New York, and within the process and jurisdiction of this honorable court.

Seventh. All and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore the libellant prays that process in due form
5 of law, according to the rules and practice of this honorable

court in such cases, may issue against said schooner "Edwin I. Morrison," her tackle, apparel, and furniture, and that all persons claiming any interest therein may be cited to appear and answer all and singular the premises, and that this honorable court will be pleased to pronounce for and decree the payment of the damages aforesaid, with costs, and that the said schooner may be condemned and sold to pay the same, and that the libellant may have such further and other relief in the premises as in law and justice he may be entitled to receive.

BRADLEY FERTILIZER CO.,
By ROB'T S. BRADLEY, *Treas.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

On this eighteenth day of March, A. D. 1884, personally appeared before me, a notary public in and for said county, the above-named Rob't S. Bradley, treasurer of said Bradley Fertilizer Company, and made solemn oath that the allegations in the above libel contained, so far as stated of its and his knowledge, are true, and so far as stated upon information and belief he believes them to be true.

In witness whereof I hereto set my hand and notarial seal the day and year above written.

CHAS. THEO. RUSSELL, JR.,
[L. S.] *Notary Public.*

6 *Charter-party.*

This charter-party, made and concluded upon in Boston the 19th day of December, one thousand eight hundred and eighty-three, between Stephen S. Lavender, master of the sch. Edwin I. Morrison of Boston, of the burthen of 534 tons or thereabouts, register measurement, now lying in the harbor of Boston, of the first part, and Bradley Fertilizer Co. of Boston, Mass., of the second part,

Witnesseth, that the said party of the first part, agrees on the freighting and chartering of the whole of said vessel, (with the exception of the cabin, and necessary room for the crew and storage of provisions, sails and cables,) or sufficient room for the cargo hereinafter mentioned, unto said party of the second part, for a voyage from Weymouth, Mass., to Savannah, Ga., on the terms following:

The said vessel shall be tight staunch strong and every way fitted for such a voyage, and receive on board during the aforesaid voyage the lawful merchandise hereinafter mentioned. The said party of the second part doth engage to provide and furnish to the said vessel a full and complete cargo of guano in bags and or bulk, and to pay to the said party of the first part, or agent, for the use of said vessel during the voyage aforesaid, one dollar and twenty-five cents ($1.25) per ton of 2,240 lbs., and load trim and lay the dunnage free of expense to the vessel. It is agreed that the lay days for loading and discharging shall be as follows, (if not sooner dispatched) commencing from the time the captain reports himself ready to receive or discharge cargo:

Dispatch in loading and discharging.

And that for each and every day's detention by default of
7 said party o*f* the second part, or agent, forty-five ($45.00) dollars per day shall be paid by said party of the second part, or agent, to the said party of the first part or agent. The cargo or cargoes to be received and delivered alongside, within reach of the vessel's tackles.

Charterers are to tow the vessel out of Weymouth free of expense. The dangers of the sea mutually excepted.

A commission of 5 % upon the gross amount of this charter, and demurrage, payable by the vessel, is due to Weltch, Humphrey & Co., upon the signing thereof.

To the true and faithful performance of all and every of the foregoing agreement, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators and assigns, and also the said vessel's freight, tackle and appurtenances, and the merchandise to be laden on board, each to the other in the penal sum of the estimated amount of this charter; and the vessel holding a lien upon the cargo for freight and demurrage.

In witness whereof, we hereunto set our hand the day and year above written.

(S'g'd) STEPHEN S. LAVENDER.
BRADLEY FERTILIZER CO.,
By ROB'T S. BRADLEY, *Treasurer.*

S'g'd in the presence of—
(S'g'd) A. P. FRUND.

8 The claimants filed their answer to said libel on the 22nd day of July, 1884, as follows:

To the Honorable Addison Brown, judge of the district court of the United States for the southern district of New York:

The answer of Stephen S. Lavender and others to the libel of the Bradley Fertilizer Company against the schooner "Edwin I. Morrison," her tackle, etc., alleges as follows:

First. That the said Stephen S. Lavender and others above named have duly appeared and intervened for their interest herein as owners of the above-named schooner, her tackle, etc.

Second. The claimants admit that said schooner was chartered at or about the time mentioned in the first article of the libel to the libellant. They refer to the written charter-party, made at or about the said time, to be produced on the trial hereof, and which said charter-party contains a full and true statement of the covenants and agreements between the parties to the chartering of the said schooner. The claimants deny each and every allegation of the said first article of the libel in any way inconsistent with the said charter.

Third. The claimants admit the shipment on board of a cargo of guano at Weymouth, Massachusetts, under said charter, to be carried in said vessel and delivered at Savannah, Georgia, and that

bills of lading were thereupon executed therefor to the libel-
9 lants, as stated in the second article of the libel. They refer to the said bills of lading, to be produced on the trial hereof, for further certainty and particularity, and deny the allegations in the said second article of the libel in any way inconsistent with the said charter-party and bills of lading. They have no knowledge as to whether or not libellants are or were at the time of the commencement of this action the owners of the said bills of lading, and therefore leave the libellants to make such proof thereof as they may be advised.

Fourth. The claimants admit each and every allegation contained in the third article of the libel, except as hereinafter denied.

Fifth. The claimants deny each and every allegation contained in the fourth article of the libel.

Sixth. The claimants deny each and every allegation contained in the fifth article of the libel.

Seventh. The claimants admit the allegations contained in the sixth article of the libel, except that they neither deny nor admit the jurisdiction of this honorable court.

Eighth. The claimants deny each and every allegation contained in the seventh article of the libel, except that they neither admit nor deny the jurisdiction of this honorable court.

Ninth. The claimants, further answering, allege that on said voyage the said vessel encountered very rough and tem-
10 pestuous weather, in consequence of which she shipped large quantities of water and was greatly damaged by the seas, and it was found on the arrival of the said vessel at Savannah that her said cargo or a portion thereof was damaged by the said perils of the seas encountered on the said voyage or from causes excepted in the said contract or contracts of affreightment.

Tenth. That all and singular the premises are true.

Eleventh. Wherefore the claimants pray the dismissal of the libel herein with costs.

BEEBE & WILCOX,
Claimants' Proctors.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Franklin A. Wilcox, being duly sworn, deposes and says that he is one of the proctors for the claimants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same, to the best of his information and belief, is true, and his belief is grounded upon information derived from correspondence with the owners and agents of the vessel and from original documents referred to in the said answer or copies thereof, and that the said claimants are now absent from this district.

F. A. WILCOX.

11 Sworn to before me this 22d day of July, 1884.

JAMES MACKLIN,
[L. S.] *Notary Public, N. Y. Co.*

12 The case was tried in the district court, and an interlocutory decree entered therein on the 7th day of April, 1886, and was as follows:

At a stated term of the district court of the United States for the southern district of New York, held at the court-rooms thereof, in the U. S. post-office building, in the city of New York, on the 7th day of April, 1886.

Present: Hon. Addison Brown, district judge.

THE BRADLEY FERTILIZER COMPANY
vs.
THE SCHOONER "EDWIN I. MORRISON."

This cause having been heard on the pleadings and proofs and the oral argument and briefs of counsel, and due consideration having been had thereon—

It is now ordered, adjudged, and decreed that the libellants recover the damages to their cargo shipped on the schooner Edwin I. Morrison on the voyage mentioned in the libel herein, and that the said schooner be condemned to pay the same, with costs.

And it is further ordered that it be referred to Francis Howland, Esq., one of the commissioners of this court, to ascertain and *pre*-port the amount of the said libellants' damages.

ADDISON BROWN.

13 This interlocutory decree was amended December 23, 1887, by adding the following words:

"Arising from water taken through the bilge pump, this clause not to exclude proof of the whole damage done to the cargo as an aid in arriving at the damage aforesaid."

Thereafter a final decree was entered in the district court on the 7th day of August, 1888, as follows:

At a stated term of the district court of the United States for the southern district of New York, held at the court-rooms, in the post-office building, in the city of New York, on the 7th day of August, 1888.

Present: Hon. Addison Brown, district judge.

THE BRADLEY FERTILIZER COMPANY
vs.
THE SCHOONER "EDWIN I. MORRISON," HER TACKLE, ETC.

An interlocutory decree having been made and entered herein on the 7th day of April, 1888, and amended on the 23d day of December, 1887, adjudging that the libellant recover against the schooner "Edwin I. Morrison," her tackle, &c., the damages to their cargo shipped on said vessel on the voyage mentioned in the libel herein, and referring it to Francis Howland, Esq., commissioners, to ascertain and report the amount of the libellant's damages arising from water taken through the bilge pump of the said vessel; and the report of the commissioner having been filed on the 28th day

of May, 1888, by which the amount of the damages sustained by the libellant as aforesaid, with interest thereon to May 21st, 1888, the date of said report, is reported at the sum of $11,033.53; and exceptions to said report having been filed by both the libellant and claimants, and the claimants having moved the court for a
14 rehearing of the case upon the evidence taken upon the trial thereof and upon the reference to ascertain the damages, and said motion and said exceptions having been argued and due deliberation had, it is—

Ordered, adjudged, and decreed that said motion for a rehearing be denied, the additional testimony taken being a part of the record for all purposes; that the tenth exception of the claimants to said report be, and the same hereby is, allowed in part, and that ten per cent. be deduced from the amount of libellant's damages reported by the commissioner as having been caused by perils of the sea and not by water taken in through the bilge pump of said vessel, and that the other exceptions of the claimants and the exceptions of the libellant herein be, and the same hereby are, overruled; that the report as modified be confirmed, and the amount of the damages sustained by the libellant, for which the said vessel is liable, with interest to May 21st, 1888, the date of the commissioner's report, is hereby ascertained to be the sum of $9,930.18.

And it is further—

Ordered, adjudged, and decreed that the libellant recover against the schooner "Edwin I. Morrison," her tackle, &c., the said last-mentioned sum, with interest on the sum of $7,902 (the amount of the damages without interest) from the 21st day of May, 1888, the date of the commissioner's report, to the date of this decree, amounting to the sum of $98.78, together with their costs, taxed at the sum of $547.79, and amounting in all, for damages, interest, and costs, to the sum of $10,576.75, and that the said schooner "Edwin I. Morrison," her tackle, &c., be condemned to pay the same.
15 And it appearing to the court that Charles L. Wright, one of the sureties on the bond to the marshal and on the stipulation for claimant's costs herein, is dead, and that letters testamentary have been granted to Elizabeth Wright, executrix of the last will and testament of said Charles L. Wright, it is—

Further ordered that, pursuant to the provisions of section 941 of the Revised Statutes, the libellant herein, The Bradley Fertilizer Company, recover a summary judgment against Stephen S. Lavender, principal, and Elizabeth Wright, as executrix of the last will and testament of Charles L. Wright, deceased, to be paid in due course of administration of his estate, and against Belcher T. Thurlow, sureties upon the bond of the marshal herein, for the sum of $16,000, the amount of said bond; and it appearing by the affidavit of Edward H. Hobbs that all the known assets of said Wright have been distributed, it is—

Further ordered that unless an appeal be taken from this decree within the time limited by the rules and practice of this court that Stephen S. Lavender, Elizabeth Wright, as executrix of the last will and testament of Charles L. Wright, deceased (out of any future assets

that may come to her hands), and Belcher T. Thurlow, stipulators for costs on the part of the claimants herein, cause the engagement of their said stipulation to be performed, or show cause within four days after the expiration of said time to appeal, or on the first day of jurisdiction thereafter, why execution should not issue against their goods, chattels, and lands for the amount of said stipulation, and that unless such appeal be taken as aforesaid the libellant
16 have execution to enforce satisfaction of this decree.

ADDISON BROWN.

The claimants appealed from such final decree to the circuit court of the United States for the southern district of New York by their notice of appeal, which was as follows:

District Court of the United States for the Southern District of New York.

THE BRADLEY FERTILIZER COMPANY *against* THE SCHOONER "EDWIN I. MORRISON," HER TACKLE, &c.—STEPHEN S. LAVENDER, Claimant.

DEAR SIRS: Please take notice that the claimant herein appeals to the next circuit court of the United States for the southern district of New York from the final decree entered herein.

Yours, etc., WILCOX, ADAMS & MACKLIN,
Proctors for Claimant.

Dated New York, Aug. 21st, 1883.

To George A. Black, Esq., libellant's proctor.
To Samuel H. Lyman, Esq., clerk.

And by their petition of appeal, which was as follows:

17 Circuit Court of the United States for the Southern District of New York.

THE BRADLEY FERTILIZER COMPANY, Libellant and Appellee, *against* THE SCHOONER "EDWIN I. MORRISON," HER TACKLE, &c.—STEPHEN S. LAVENDER, Claimant and Appellant.

To the honorable circuit court of the United States for the southern district of New York:

The appeal of the above-named claimant and appellant respectfully shows—

That on or about the 20th day of March, 1884, the above-named libellant filed its libel in the district court of the United States for the southern district of New York against the above-named schooner, her tackle, &c., claiming over fifty dollars, and praying, among other things, that the said schooner be condemned to pay the

libellant's claim, with costs, as by reference thereto will more fully appear.

That the present claimant and appellant duly appeared in said suit, and on or about the 22nd day of July, 1884, duly filed his answer to said libel, praying that the same be dismissed, with costs, as by reference thereto will more fully appear.

That on or about the 25th day of January, 1886, the cause came on to be heard before the Honorable Addison Brown, judge of the said district court, upon the pleadings and the proofs ad-
18 duced by the respective parties, and on or about the 7th day of April, 1886, said court made an interlocutory decree which was thereafter amended, adjudging that the libellant recover the damages by it sustained as alleged in said libel, and that it be referred to Francis Howland, Esq., commissioner, to ascertain and report such damages, as by reference thereto will more fully appear.

That said reference having been proceeded with the report of said commissioner was filed on or about the 28th day of May, 1888, whereby the libellant's damages were fixed at the sum of $11,033.53, and thereafter exceptions were filed to the same by the libellant and claimant respectively, as by reference thereto will more fully appear.

That thereafter, on or about the 19th day of June, 1888, said exceptions were duly argued, and the claimant at the same time duly moved for a rehearing of said cause upon the testimony taken upon the trial and reference, and upon other and additional testimony duly taken by him, as by reference thereto will more fully appear.

That thereafter, on or about the 7th day of August, 1888, a final decree was made and entered, whereby, among other things, it was ordered, adjudged, and decreed that said motion for a rehearing be denied, but that the additional testimony taken be considered a part of the record for all purposes; that the tenth exception taken by claimant to the report of said commissioner be allowed in part; that all other exceptions taken by the claimant and all ex-
19 ceptions by the libellant be overruled and said report confirmed as modified, and that the libellant recover against the said schooner, her tackle, &c., the sum of $10,576.75 damages, interests, and costs, as by reference thereto will more fully appear.

That this appellant insists that said decree in erroneous in that said libel ought to have been dismissed with costs; that said motion for a rehearing should have been granted, and said exceptions taken by claimant to said report should each and all have been sustained.

And this appellant for this and other reasons appeals from said decree to the circuit court of the United States for the southern district of New York, and on appeal it intends to have said cause heard anew on the pleadings and proofs in the district court, including said additional testimony, and on other and new pleadings and proofs to be introduced in the circuit court, and prays
20 that the proceedings, pleadings, and proofs be returned to said circuit court, and that the circuit court will make a

decree reversing the decree of the district court and dismissing the libel, with costs.

Dated New York, Sept. 4th, 1888.

WILCOX, ADAMS & MACKLIN,
Proctors for Claimant and Appellant.

To Geo. A. Black, Esq., proctor for libellant; Samuel H. Lyman, Esq., clerk.

Thereupon this cause came on for hearing in the United States circuit court for the southern district of New York upon the evidence taken in said district court and upon further proofs taken by the claimants and libellants in the circuit court, and thereupon the libellant requested the said circuit court to make certain findings of fact and conclusions of law, which proposed findings numbered V, VI, and VII were as follows and conclusion of law as follows:

V.

On the port side of the schooner, in the water-way, and close to the bulwark, a hole, covered with a brass plate, for the purpose of introducing a pipe into the bilges of the vessel, had been made in the schooner when she was built. In the brass plate was a movable cap. This hole was a short distance in front of the poop and ran down through the water-way between the ceiling and skin of the ship on the main deck. There was a similar hole on the poop deck on the starboard side. The hole was about three inches in diameter, and the brass plate which covered it was square and
21 countersunk into the water-way and fastened by four screws, and this hole and plate had been in the schooner about eleven years at the time of making this charter. It had not been used for four or five years and had not been tested in any manner to ascertain whether it was perfectly tight and secure. Striking it with a hammer or unscrewing the cap were tests which could have been made. Such a hole was dangerous unless the caps and plates were kept perfectly tight and secure. If the wood were sound and the screws sound and properly proportioned to the hole in which they were inserted, they would break off before they would draw out of the wood.

VI.

By some defect or weakness the plate and cap and the screws which secured it came out of this hole on the voyage to Savannah and allowed the water to enter the vessel, causing the cargo to become wet and damaged.

VII.

The libellants' cargo was damaged to the amount of $9,175.40 by the water which entered the vessel by reason of the defect in the bilge-pump plate.

Conclusion of Law.

I.

That the libellants are entitled to recover from the schooner "Edwin I. Morrison" their damages by reason of the defect in the said schooner, amounting to the sum of $9,175.40, with interest thereon from the 12th day of November, 1884, and the costs of the district court, taxed at the sum of $547.79, and the costs of the circuit court, to be taxed.

22 The said circuit court thereupon made its findings of fact and conclusions of law, as follows:

U. S. Circuit Court, Southern District of New York.

THE BRADLEY FERTILIZER COMPANY, Libellant & Appellant,
vs.
THE SCHOONER "EDWIN I. MORRISON," HER TACKLE, &C.—STEPHEN S. LAVENDER *et al.*, Claimants and Appellants.

Findings of Fact.

I.

The schooner "Edwin I. Morrison," owned by the claimants, was chartered on Dec. 19th, 1883, by a written charter-party, to the libellant for a voyage from Weymouth, Mass., to Savannah, Ga., to carry a complete cargo of guano in bags and (or) bulk for a price agreed upon.

II.

By the charter-party it was agreed on the part of the vessel that she "should be tight, staunch, strong, and every way fitted for such a voyage," and "the dangers of the sea (were) mutually excepted."

III.

Under this charter there was loaded on board said schooner by the libellant a cargo of guano, superphosphate, and other fer-
23 tilizers, viz., $343\frac{168}{240}$ tons in bulk and $410\frac{35}{61}$ tons in bags, besides 3,925 empty bags and sacks. Six bills of lading were given therefor, which acknowledged the receipt of said cargo in good order and condition and agreed to deliver the same in like good order and condition at Savannah, the dangers of the sea only excepted. The bulk cargo was stowed between decks and the remainder in the lower hold.

IV.

The cargo was what is known as a "dead cargo," and a hard one for a vessel to carry in severe weather.

V.

The vessel was not overloaded. She was accustomed to and able to carry that amount of cargo of the same character at that season.

VI.

The vessel was built in 1873; had three masts; was about 155 feet long over all, carrying spanker, mainsail, foresail, forestaysail, jib, flying jib, outer jib, foretopsail, maintopsail, and mizzen-topsail. She was properly manned and equipped. Her officers and crew consisted of a master, first mate, second mate, steward, and four sailors. On this voyage she had two passengers on board, viz., the master's wife and a lady friend.

VII.

On the port side of the vessel, in the water-way, and close
24 to the bulwark, there was a hole about three inches in diameter, made when she was built, for the purpose of introducing a hose pipe into her bilges to free her of any water accumulated there. The water-way (of yellow pine) was about three and a half inches above the deck. The hole was a short distance in front of the poop and ran down through the water-way, between the ceiling and the skin of the ship. The hole was covered by a brass plate about four inches square, countersunk into the timber flush with the top of the water-way and fastened by four brass screws. In the brass plate was a removable cap, also of brass, intended to be unscrewed from the plate when the hole was to be used, but it had not in fact been used for four or five years (if, indeed, at all), and was painted over whenever the water-way was painted. The removable cap projected about three-eighths of an inch above the surface of the plate, the edges being beveled so as to leave not more than an eighth of an inch of perpendicular surface. There was a similar plate and cap on the starboard side of the vessel, but somewhat further aft and upon the poop deck.

VIII.

Such bilge-pump holes are not unusual in vessels constructed in some localities. The plates are generally considered permanent fixtures, not peculiarly susceptible to deterioration from age. Verdegris sometimes forms around brass screws, thus weakening the hold of the wood; cut water-ways located as this was, well covered up and well painted, are not liable to rot, and their reasonable expectation of sound life is largely in excess of twelve years.

25 If the plates and caps which are generally used to cover such holes are not kept tight and secure the holes become dangerous; but that mode of covering was generally deemed secure by seafaring men, and seldom, if ever, have any accidents arisen from their use.

IX.

The bilge-pump hole, heretofore described as located in the water-way, was opposite a port in the bulwarks of the vessel. The opening of the port was about a foot square, beginning about two inches from the bulkhead of the poop deck. The poop deck was about four and a half feet above the main deck, and extended from just about the mainmast to the stern.

X.

Said bilge-pump plate was in plain view, upon a casual inspection, at the time of making the charter and loading the vessel. The vessel was loaded several times before this voyage by the libellant.

XI.

Before the vessel sailed the cap and plate appeared to be in good order, with no indication of looseness. The examination which was at that time made of them consisted of such inspection as could be given by the eye, and to such an inspection they were from time to time subjected. They were not tested either by unscrewing the cap or the plate or by tapping the plate with a hammer. Tapping with a hammer or unscrewing the cap might have developed any insecurity (if there were any) in the bilge-pump plate. Im-
26 mediately after the loss of the port-bilge plate (hereafter described) the mate tested the condition of the similar plate on the poop deck, starboard side, by tapping with a hammer, and found it apparently sound.

XII.

The examination which was made of the cap and plate, as set forth in the XIth finding (viz., by a survey without the use of special tests, unless there is some appearance of defect), is such as a reasonably prudent master or owner might be expected to give them in order to determine the seaworthiness of his vessel before beginning a voyage.

XIII.

The voyage began the 5th day of January, 1884, and the vessel actually got to sea on the 7th, when she encountered a strong northwest gale. The light sails were furled and the mainsail and foresail double-reefed. The gale caused her to labor heavily and ship large quantities of water, some of which entered the cabin and reached the cargo. The vessel was driven out of her course and into the Gulf stream. The gale moderated somewhat the latter part of the day, but the vessel still continued to roll heavily and shipped plenty of water. The pumps were attended to and the vessel was found to be making considerable water. The next day the gale continued, with a very heavy sea running, until about 4 p. m., when it moderated, and at 6 p. m. topsails were set. The latter part of the day there was a strong breeze, and two reefs were

made in the spanker. The vessel made little water this day. The next day, the 9th, began with a strong southeast breeze, which freshened to a strong gale. Two reefs were made in main and
27 fore sails. At 4 p. m. the spanker and jib were furled. The middle part of the day there was a very sharp gale and heavy sea running. The vessel labored heavily and shipped great quantities of water. The pumps were carefully attended to, and she was found to be making considerable water. The latter part of the day the wind was still increasing and the foresail and the forestaysail were furled. It was then blowing a "living" gale from the westward. The weather through the night continued to be extremely severe; there was a "terrific gale of wind." Planks were carried away from the bulwarks of the starboard side of vessel, also one of the ports; the water-way on starboard side was started off. The covers of the chain locker and a spar were found loose in the morning, floating in the waist of the vessel on both sides. Coal washed about decks; also buckets and bucket racks; also pieces of bulwark. The forecastle door and galley door were washed off, but were not lost. The men could not stand at pump on main deck because it was continually swept by the seas, and it was with difficulty that they were able to work at the pump on the poop deck, which was about four and a half feet higher than the main deck, on account of the sea breaking over. Before midnight the vessel was hove to under a storm trysail, two-reefed foresail, and forestaysail on the port tack. The vessel was shipping water through the cabin windows, doors, and down the booby hatch. The cabin was situated in the after part of the poop deck. The top of the cabin-house was about three and a half feet above the deck. They commenced to take water in the cabin while eating supper, and
28 all through the night it forced its way in. This was unusual and indicated very bad weather and a rough sea. Everything in the cabin was drenched, excepting the berths, with water washing around the cabin with motion of vessel. Water reached the cargo during the night through the cabin, a strained water-way, and otherwise. The pumps were tried every two hours, and by four o'clock Thursday morning it was discovered, by the pumps bringing up guano with the water, that the cargo was wet. The master of the vessel did not go to bed during the night, but was mostly on deck. Previous to 4.30 o'clock in the morning they were able to get a suck on the pumps, indicating that there was no water then in the well, but after that they were unable to do so. At this time the weather was very bad, a very bad sea flooding the decks continually and washing everything movable about. About five o'clock they sounded and found eighteen inches of water in the well. In about half an hour afterwards they wore ship, putting the vessel before the wind, so that the men could stand at the pumps. This gave the vessel a list to port. The only outlets on the port side for the seas that came aboard were the open port above mentioned and the scuppers. They continued pumping, but still were unable to get a suck, and at nine o'clock soundings showed about seven feet of water in the vessel. Preparations were then made to abandon the vessel, as

she was supposed to be sinking. The lashings of the boat on the poop deck were cut and the women on board came up from the cabin to take the boat. Between ten and eleven o'clock they wore ship and
the vessel slowly righted up, the booms swinging from the
29 port to the starboard side, bringing the port side out of the
water. The vessel was then working heavily in the sea, losing steerage-way, and settling fast. When the vessel righted up and rolled her lee side out of water, the second mate, who with others fastened with lines to prevent them from being washed away, was working at the pump on the main deck, heard a heavy gurgling sound, and let go the pump and went over to the port side, put his hand against the rail, and looked down under it to where the bilge-pump plate was, and saw a hole large enough to put his hand in. He ran his hand and arm down the hole and sung out to the captain, "Look here!" Being greatly excited and not looking for such a thing, he hardly realized what the trouble was. The captain came and said, "My God, this is the bilge pump." It was found that the whole bilge-pump plate, with the screws, was gone.

XIV.

The wood to which the plate had been fastened looked white and sound. From the holes out of which the screws had come part of the clear wood was itself hauled, the splinters hanging around the edges of the holes, the holes thus presenting a ragged look. The screw-holes were not smooth nor black nor rusty. The wood of this particular water-way in the vicinity of the plate did not look rotten, and when after arrival Savannah the temporary plugging referred to in the XVIIth finding was removed, and the hole plugged and covered with sheet lead, the timber into which the plug was driven and on which the lead was nailed was found solid, and since that time the covering has not been further repaired nor the timber changed in any way.

30 XV.

No marks of violence other than the splintering of the wood about the screw-holes was visible upon the water-way or upon the adjacent bulwarks or stanchions.

XVI.

As no one witnessed the removal of the bilge-pump plate, direct evidence of the cause of this mishap is not obtainable. It is, however, to be inferred from the facts proved that it was knocked out by something striking violently against it subsequently to the time when they wore ship after finding eighteen inches of water in the well, which would be between 5 a. m. and 5.30 a. m.

XVII.

The hole was at once plugged up, covered with canvass, and sheet lead nailed over the canvass.

XVIII.

At this time the wind had abated somewhat. The vessel's wheel was tied hard up and the sails trimmed so that she would lie to, and the crew went to work pumping again and gained on the water. By eleven or twelve o'clock that night they succeeded in getting her free of water, so far as the pumps could do so, and the journey was continued.

XIX.

Afterwards it was found that the mainmast had been loosened by the working of the vessel, and that the coating was broken;
31 also that a scupper on the starboard side was broken.

XX.

The weather continued severe during almost the entire voyage and the injury to cargo was increased thereby.

XXI.

The vessel arrived in Savannah January 27th.

XXII.

Upon the arrival she delivered her cargo, some of it in a damaged condition. The extent of the damage was $9,175.40.

XXIII.

At the time of the contract and lading of cargo and commencement of voyage the vessel was tight, staunch, and strong, and in every way fitted for the contemplated voyage.

XXIV.

There was no latent defect in the vessel which contributed to the injury to the cargo.

XXV.

There was no fault or negligence in the navigation of the vessel or care of the cargo.

XXVI.

The whole of said damage to cargo was caused by a danger of the seas, and was within the exception in charter-party
32 and bills of lading.

Conclusions of Law.

First. The damage is to be attributed to the dangers of the seas, and not to the fault of the vessel.

Second. The decree of the district court is reversed and the libel dismissed with costs of both courts.

E. HENRY LACOMBE.

Thereupon said libellant moved in the said circuit court to correct the said findings of fact and for a further additional finding of fact; which motion was heard by said circuit court, and it thereupon made its order thereon as follows:

At a stated term of the circuit court of the United States for the southern district of New York, held at the U. S. court rooms, in the post-office building, in the city of New York, on the 24th day of January, 1890.

Present: Hon. E. Henry Lacombe, circuit judge.

33 BRADLEY FERTILIZER COMPANY
vs.
THE SCHOONER "EDWIN I. MORRISON," HER TACKLE, &c.

The libellant having moved that the findings of the court filed herein on the 24th day of October, 1889, be amended in the following particulars:

I. That the first finding be amended by changing the date of the charter-party from May 19, 1883, to December 19, 1883.

II. That the 9th finding be amended by adding to the description of the location of the bilge-pump hole the words "in the bulwarks of the vessel," after the words "opposite a port."

III. That the 11th finding be amended by adding thereto the words "Tapping with a hammer or unscrewing the cap would have developed any insecurity in the bilge-pump plate, and the tapping with the hammer was the means adopted by the mate of this vessel to test the condition of the bilge-pump plate on the poop deck on the starboard side immediately after the loss of the plate."

IV. That the 13th finding be amended (*a*) by striking out the word "parts," before the words "of the chain locker," and inserting in place thereof the words "the covers."

(*b.*) The same finding, "The forecastle door and galley door were washed away." This should read, "The forecastle door and galley door were washed off, but were not lost, and no part of the vessel was missing."

(*c.*) The same finding, "The vessel was hove to on the port
34 tack." This should read, "The vessel was hove to on the starboard tack."

V. That the 14th finding be amended by adding at the end thereof, "No spars nor sails were carried away and no repairs were made to the vessel at Savannah beyond nailing a few boards on the starboard side where the bulwarks had been broken, which was done by the crew, and the vessel, after discharging, loaded with a cargo of phosphate rock, which is a much harder cargo to carry than guano, and delivered it safely."

VI. That the 15th finding be amended by inserting the word "screw" in front of the word "holes."

VII. That the 23rd finding be amended by inserting the word "apparently" before the word "tight."

VIII. That the 24th finding be amended by inserting the words

"It is to be inferred from the facts found in the 16th finding that," before the words "there was no latent defect," &c.

IX. That the 26th finding be amended so as to read as follows: "The whole of the said damage to cargo was caused by the dangers of the seas, specified in the 13th, 16th, and 20th findings, and was within the exceptions in the charter-party and bills of lading," and that a new finding be made, numbered XXVII, as follows:

"No proof was given as to the size of the screws used in fastening the bilge-pump plate in place, nor as to the manner in which they were inserted, nor of their sufficiency to hold said plate, nor of their condition when carried away. The screws were brass
35 screws and were liable to injury by corrosion and the lapse of time."

It is ordered that the findings filed by this court on the 24th of October, 1889, be, and the same hereby are, amended as follows:

1. By inserting in the first finding the date December 19, 1883, instead of May 19, 1883.

2. By inserting in the 8th finding the words "verdigris sometimes forms around brass screws, thus weakening the hold of the wood, but" between the words "age" and "water-ways."

3. By inserting in the 9th finding the words "in the bulwarks" between the words "port" and "of the vessel."

4. By adding at the end of the 11th finding the following: "Tapping with a hammer or unscrewing the cap might have developed any insecurity (if there was any) in the bilge-pump plate. Immediately after the loss of the port bilge-pump plate (hereafter described) the mate tested the condition of the similar plate on the poop deck, starboard side, by tapping with a hammer, and found it apparently sound."

5. By striking out from the 13th finding the word "parts" before the words "of the chain locker" and inserting in place thereof the words "the covers," and by inserting after the words "the forecastle door and galley door were washed" the words "off, but were not lost," and by striking out the word "away."

36 6. By inserting in the 15th finding the word "screw" before the word "holes."

And it is further ordered that the other findings and amendments requested by said libellant be, and they hereby are, refused, and its motion therefore denied.

And it is further ordered that the libellants have sixty days within which to prepare and file exceptions and a bill of exceptions for the purpose of an appeal, and that the entry of the decree herein be stayed until the settlement, signing, and filing of said bill of exceptions.

E. HENRY LACOMBE.

No objections to form of order.
New York, June 24, 1890.

WILCOX, ADAMS & MACKLIN,
Proctors for Claimants.

Thereupon the libellant filed exceptions to the said findings and refusals to find of said circuit court, which were duly allowed by said court, as follows:

37 U. S. Circuit Court, Southern District of New York.

THE BRADLEY FERTILIZER COMPANY, Libellant & Appellant,
vs.
THE SCHOONER "EDWIN I. MORRISON"—STEPHEN S. LAVENDER, *et al.*, Claimants & Appellees.

Exceptions of Libellant.

I. Libellant excepts to the fifth finding of fact, to the effect that the vessel was not overloaded, on the ground that the contrary is conclusively shown by uncontradicted evidence.

II. The libellant excepts to so much of the seventh finding of fact as states "that the removable cap projected three-eighths of an inch above the surface of the plate," on the ground that the evidence conclusively shows by uncontradicted evidence that said cap did not project more than one-eighth of an inch above the surface of the plate, the edge being bevelled.

38 III. Libellant excepts to so much of the eleventh finding of fact as states that "before the vessel sailed the cap and plate appeared to be in good order, with no indication of looseness," on the ground that such finding is unsupported by the evidence, and that no evidence whatever has been introduced to prove it.

IV. Libellant excepts to so much of the thirteenth finding of fact as states that "planks were carried away from the bulwarks on the starboard side of the vessel; also one of the ports, and the water-way on the starboard side was started off," so far as the same finds or intends to find that planks were carried away at the time specified, viz., before the loss of the bilge-pump plate, as being without evidence to support it, and that the contrary is conclusively proved by uncontradicted evidence.

V. Libellant excepts to so much of the thirteenth finding of fact as states that "a spar was found floating on both sides of the vessel," on the ground that the same is contrary to the evidence, and the contrary, viz., on one side of the vessel only, is conclusively shown by uncontradicted evidence.

VI. Libellant excepts to so much of the thirteenth finding of fact as states that the "men were not able to work the pump on the main deck," so far as the same finds or purports to find that such inability existed before the loss of the bilge-pump plate, on the ground that the same is contrary to the evidence, and that

39 the contrary is conclusively shown by uncontradicted evidence.

VII. Libellant excepts to so much of the thirteenth finding of fact as states that "before midnight the vessel was hove to on the port tack," on the ground that there is no evidence to support a finding that the vessel was hove to before midnight and on the

ground that, so far as the same finds that she was hove to on the port tack, such finding is contrary to the evidence, and that the contrary is conclusively shown by uncontradicted evidence.

VIII. Libellant excepts to so much of the sixteenth finding of fact as states that "it is to be inferred from the facts proved that the bilge-pump plate was knocked out by something striking violently against it," on the ground that there is no evidence to support the same, nor is such finding one which the law permits on the evidence given in this case, in view of the rule of law as to the burden of proof applicable to the facts proved in this case.

IX. Libellant excepts to so much of the sixteenth finding of fact as states that "the bilge-pump plate was knocked out subsequently to the time when they wore ship after finding 18 inches of water in the well," on the ground that there is no evidence to support it, and the same is contrary to the inferences which should be properly drawn from the facts proved, in view of the rules of law as to the burden of proof applicable to the facts proved in this case.

40 X. Libellant excepts to the twenty-third finding of fact on the ground that no evidence whatever has been introduced to prove it, and that the contrary is to be inferred from the facts proved in this case, in view of the rules of law as to the burden of proof applicable to the facts in this case.

XI. Libellant excepts to the twenty-fourth finding of fact on the ground that no evidence whatever has been introduced to prove it, and that the contrary thereof is to be inferred, in view of the rules of law as to the burden of proof applicable to the facts in this case.

XII. Libellant excepts to the twenty-fifth finding of fact on the ground that no evidence whatever has been introduced to prove it, and that the contrary thereof is to be inferred, in view of the rules of law as to the burden of proof applicable to the facts in this case.

XIII. Libellant excepts to the twenty-sixth finding of fact on the ground that no evidence whatever has been introduced to prove it, and that the contrary thereof is to be inferred, in view of the rules of law as to the burden of proof applicable to the facts in this case.

XIV. Libellant excepts to the first conclusion of law on the ground that the same is erroneous, and that under the rules of law as to the burden of proof applicable to the facts in this case the court should have found as conclusion of law that the damages to cargo were to be attributed to the defects in said vessel and not to the dangers of the seas.

41 XV. Libellant excepts to the second conclusion of law.

XVI. Libellant excepts to the refusal of the court to make the amendment to the thirteenth finding of fact so as to make it appear that no part of said vessel was missing, on the ground that the fact refused was material and had been conclusively shown by uncontradicted evidence.

XVII. Libellant excepts to the refusal of the court to amend the fourteenth finding, as requested, by adding to the end thereof "No spars or sails were carried away and no repairs were made to the vessel at Savannah beyond nailing a few boards on the starboard side, where the bulwarks had been broken, which was done by the

crew, and the vessel, after discharging, loaded with a cargo of phosphate rock, which is a much harder cargo to carry than guano, and delivered it safely," on the ground that the facts refused were, and each of them was, material and had been conclusively shown by uncontradicted evidence.

XVIII. Libellant excepts to the refusal of the court to amend the twenty-third finding by inserting the word "apparently" before the word "tight," on the ground that such finding was material and had been conclusively shown by uncontradicted evidence, and that the finding made without such amendment was a finding without evidence to support it, and was not a finding to be inferred from the facts in view of the rules of law as to the burden of proof applicable to the facts in this case.

XIX. Libellant excepts to the refusal of the court to
42 amend the twenty-fourth finding by inserting the words "It is to be inferred from the facts found in the 16th finding" before the words "there was no latent defect," in order that it might be made to appear that such finding was a finding of a doubtful fact inferred from circumstantial facts upon which there was doubt as to the legal effect, and that it thereupon became the duty of the court to so frame its findings as to put the doubtful question into the record.

XX. Libellant excepts to the refusal of the court to amend the twenty-sixth finding so as to read, "The whole of said damage to cargo was caused by dangers of the seas, specified in the 13th, 16th, and 20th findings," on the ground that such finding was a finding of an inferred fact based upon circumstantial facts alone, as to which there was doubt as to the legal effect, and that it thereupon became the duty of the court to so frame its findings as to put the doubtful question into the record.

XXI. Libellant excepts to the refusal of the court to make a 27th finding as follows: "No proof was given as to the size of the screws used in fastening the bilge-pump plate in place, nor as to the manner in which they were inserted, nor of their sufficiency to hold said plate, nor of their condition when carried away," on the ground that such finding was a material finding, as to which there was no contradiction in the evidence, and which was also a material finding from which to infer material facts in order to properly apply the rules of law as to the burden of proof applicable to the facts in this case, and also that the same were material facts as circum-
43 stantial facts upon which should be based a conclusion as to a doubtful fact, and it was the duty of the court, when requested, to so frame its findings as to put the doubtful question into the record.

XXII. Libellant excepts to the refusal of the court to find so much of the proposed new finding to be numbered 27 as finds that the "screws were brass screws and were liable to corrosion and injury from the lapse of time," on the ground that the same was a material fact and had been conclusively shown by uncontradicted testimony.

XXIII. Libellant excepts to the refusal of the court to find so

much of the fifth finding of fact proposed by libellant as stated that such a hole—*i. e.*, the bilge-pump hole—was dangerous unless the cap and plate were perfectly tight and secure, on the ground that such finding was material and was conclusively shown by uncontradicted evidence.

XXIV. Libellant excepts to the refusal of the court to find so much of the fifth finding of fact proposed by libellant as states that "if the wood was sound and the screws sound and properly proportioned to the hole in which they were inserted they would break off before they would break out of the wood," on the ground that the same was a material fact and was conclusively shown by uncontradicted testimony.

XXV. Libellant excepts to the refusal of the court to find the sixth finding of fact proposed by the libellant on the ground that such fact was material and was conclusively shown by un-
44 contradicted evidence, in view of the rules of law as to the burden of proof applicable to the facts in this case.

XXVI. Libellant excepts to the refusal of the court to find the seventh finding of fact proposed by the libellant on the ground that such fact was material and was conclusively shown by uncontradicted evidence, in view of the rules of law as to the burden of proof applicable to the facts in this case.

XXVII. Libellant excepts to the refusal of the court to find the first conclusion of law proposed by libellant.

GEO. A. BLACK,
Proctor for Libellant.

Allowed.
E. H. LACOMBE.

Thereupon and inasmuch as the said matters excepted to do not appear and to the end that the same may appear the said court has made and signed a bill of exceptions containing all the evidence bearing upon the matters excepted to as follows:

Deposition of Stephen S. Lavender, Taken on Behalf of the Libellants March 25, 1884.

Examined by Mr. BLACK he testified as follows:

I am master of the "Edwin I. Morrison" and have been for four years next August. I am part owner as well, owning one sixty-fourth. I have so much a month wages and five per cent. of the gross freights. On the 19th of December, 1883, the vessel was in Boston. I made the charter-party of her there and produce it.

Witness produces copy of charter-party, which is offered in evidence and marked Ex. A.

It is the same as the charter-party annexed to libel. I loaded a cargo of guano under that charter—756 long tons in bags
45 and bulk. It was loaded at Weymouth, Mass., in bags in the lower hold and in bulk between decks; 300 tons were in

bulk and the balance in bags. Mine is a double-deck vessel, properly trimmed and dunnaged.

They done the whole themselves. I was not there while it was being loaded. I saw it after it was loaded. I sailed the 4th day of January from Weymouth.

I had a mate, second mate, steward, and four sailors. I left the vessel on the 7th day of March at Elizabethport; I arrived at Savannah the 27th day of January. When I arrived at Savannah the between-decks cargo was in very good order, but the lower-hold cargo was very much damaged by sea water. My lower hold is nine and a half feet and eleven feet. When loaded with this cargo aboard the draught was sixteen feet seven inches. I had four feet and a half of freeboard opposite the main hatch—from the water level up to the main deck. I never measured; loaded by the stern in good trim. Mine is a three-masted schooner. I had two syphon pumps and a diaphragm pump. The syphon pumps were amidships and the diaphragm pump, I should say, twenty feet by aft of the amidships—that is, over the line of the keel.

At 9 a. m. on January 10th I found rising seven feet of water in the hold. I discovered it by sounding the pumps. I had sounded the pumps before that—before daylight, the same morning about five o'clock—and then had eighteen inches. At the time I sounded before daylight we were on the port tack, laying to; the wind was southward and westward. We were on the port tack, laying to, before daylight, when I first sounded. When I found the seven feet of water in the hold we were running free, with the wind on the starboard quarter. There were four hours' interval
46 between the time of sounding the pumps before daylight and finding 18 inches and sounding at nine o'clock and finding seven feet. In that interval we had been pumping the after pumps. At the time I discovered the 18 inches the vessel had a port list, a two-streaks list. Her water-ways were under water and decks, too. The water was washing over, and the list brought her over, and every time she gave a little more list she would go under. The decks were flooded and the cabin also. The vessel had been lying to since ten o'clock at night. We hadn't sounded before we found the 18 inches. The pumps were sucking all the time. They had been tried before that time every two hours. When I found the 18 inches of water it was the second mate's—my watch. I had been on deck all night, off and on. When I found the 18 inches of water I think all hands were on deck. We kept her off to free the pumps, and I think all hands were there. The pumps had been tried by the mate before I discovered the 18 inches every two hours in the middle watch, about four o'clock. I always make it a practice to try my pumps every two hours. It was not at one of the stated times—every two hours—that I tried the pumps and found the 18 inches. What induced me to try the pumps at *the* that time was that they pumped longer than I ever knew them to pump before. They started to pump, say, half past four. I think the second mate and another sailor were at the pumps at the time. I got her before the wind in order to stand at the pumps, and when she was before

the wind she had a list to port. Her booms were at that time on the port side, and she continued with her booms on that side until ten or eleven o'clock; then we wore ship. We were hove to when
47 we discovered the hole. The wind was in the same direction. As we wore ship the vessel did not right up at once. When she righted up that brought her port side out of the water; then it was between ten and eleven o'clock. The righting up of the vessel was caused by wearing ship, the booms coming off on the other side. The cause of the increase of the water in the hold was then discovered by the second mate. My attention was drawn to it right away. It was the bilge-pump plate on the port side in the water-way on the main deck—that plate was gone. The opening into which that plate fitted was, I should say, three inches, leading to the bottom of the vessel, between the ceiling and the planking, about amidships. There were two of these bilge-pump plates on the schooner, one on each side, not opposite each other. The other one was about two feet aft of the one on the port side. They were put on the schooner when she was built. I should say they were brass or composition. William Fernald, of Portsmouth, New Hampshire, built the schooner. I always examined bilge plates, scuppers, pumps, and everything the day I started to go to sea. I recollect having examined these bilge plates on the 4th of January. There was not anybody in company with me. On January 4th, before starting, I looked at them. They were right before my eyes. There was no examination to make. They had never been used, to my certain knowledge, for four years. They are put there to use with the force-pump—to pump the vessel out as she has her list over. They have a removable opening fixed to them by a screw. It is opened, I suppose, with a wrench—a two-pronged screw-driver. I never saw the screws taken out. There is a removable screw-cap
48 which screws into the plate where the bilge plate fits, and the plate is fastened to the deck by screws. The plate is square. Of course, the hole is round where the plug screws in. The plate is square and is let into the wood the thickness of the plate, so that the plate is flush with the water-way. I do not know how many screws hold that plate to the deck. I have not had a new plate put in—got done with that plate business. I have not had the starboard plate taken out. When I discovered the hole at the time we wore ship, at eleven o'clock on the 10th of January, it was stopped immediately with oakum, canvass, and lead. As soon as we freed her deck when lying to, the deck was partially free at times, so we could get at it and work to cover up this hole, inconvenient though. The vessel was cleared of water after that a great deal more than she had been during the day or night. The wind abated some and she cleared herself more by pumping her out. We continued pumping her until the pumps sucked, pumping continuously for six or seven hours, so that by the next day she was partially free. She would make water the next day. She would make considerably more water than in the ordinary course of the voyage. I found more than 18 inches of water in her again, several times, I think. I have no record of it. In sounding a vessel when she rolls, of

course the water runs up on your rod and of course you can't tell exactly. I can't say how deep the well is below the line of the ceiling. The pumps will suck with four inches of water in my vessel. The water will rise in the well, I should say, eight inches before it will reach the top of the ceiling. I do not mean to say there is only eight inches keel. I should judge the frames are eight
49 inches thick at the bottom. I think that is pretty heavy timber.

"Q. Had you had eighteen inches of water in the Morrison at any time before the fact existed of this bilge-pump cover being gone?

"A. In the morning we had, before we knew of the bilge-pump cover being gone."

I have navigated in half a dozen or more different vessels as master. One of them had bilge-pump plates. I had never known them to be carried away on the vessel I was on. I have known of it on other vessels.

The Morrison at this time was nearly eleven years old. I have produced our log book. It is in the mate's handwriting. I knew the entries made in it at the time they were made. I saw the log book two or three times a week; the entries were always accurate. There was one entry made by the notary. The events were noted in the log book as soon as the mate got time to write them. There was a slate log book and I saw that the entries were correctly entered from the slate log. No changes have been made in that log except the entry by the notary. The contents are the true occurrences of the voyage so far as it states them. It is not enough.

Witness produces the log and the book is marked Exhibit B.

The mate has been with me a year and a half at one time on this particular vessel, and one voyage before this, a previous year and a half on this same vessel.

All the entries which I produce in regard to this voyage are in the mate's handwriting except the notary's. The pencil memoranda in this log book on Monday, January 7th, and Thurs-
50 day, January 10th, are in the notary's handwriting, I think—the notary before whom the mate testified in Savannah. I was present when he made those entries and consented to their being made.

"Q. Before this time, when you found the 18 inches of water, had there been anything to call your attention to the fact that the vessel was making more water than ordinary?

"A. Yes, sir.

"Q. What was it?

"A. The appearance of the vessel; also the water down the poop deck."

I found 18 inches of water the first time I sounded the pumps. I did not know how many inches of water there were before the time I found the 18 inches. The pumps were sucking. When the vessel would roll it would take more strokes to free her than at other times.

"Q. Was there anything more than the usual natural leakage of the vessel?

"A. No, sir.

"The bilge-hole plate is square and the bilge-hole cap is round. The one is intended to screw into the other. One is removable and the other is supposed to be fixed.

"Q. I call your attention to this entry in the log: Thursday, January 10th, 1884. This day begins with a strong westerly gale and sea still running very high. At 8 a. m. set two-reef foresail; find that the vessel is making water faster than we can pump it out with both pumps; sounded pumps and find that she has seven feet of water in the hole; cut the boat lashings and got all ready to leave the vessel, when found that the cap had been washed off the bilge pump on the port side; nailed a piece of sheet lead over it
51 and started both pumps going; pumped two hours and sounded again; find that we are freeing her very rapidly. So ends this day.

"Q. Did you know of that entry?

"A. Yes, sir.

"Q. And how soon after that was it made?

"A. As soon as the mate got time.

"Q. The figure 7 in this entry seems to have been written over an erasure, does it not?

"A. Well, I guess it was not plain enough for the notary, and he wrote it plainer; that's all."

I see that there has been a scratching of the paper there. I don't know anything about it. I think the notary made it plainer; that is all. I can't explain why that was done. I made the protest at Savannah and had it read over to me before signing it. It was correct as read. I did not have any alteration or correction made in it, as it was read to me before I signed it. The protest was prepared from the log. The notary had the log.

"Q. Did you compare the entries in the protest as read to you with the entries in the log?

"A. It was my remembrance.

"Q. I read from a copy of protest and ask whether this is your recollection: 'Blowing strong gale and sea very high. 8 a. m. set two-reefed foresail and storm-trysail and hove vessel to, heading about south; found vessel making water faster than we could free her; men not able to stand at pumps steadily because of the heavy seas sweeping her decks. On sounding pumps found about 7 feet of water in hold, on which we cut boat lashings and got ready to leave her, when we found cap gone from off bilge-pump hole on the port side; nailed a piece of sheet lead over hole and started
52 both pumps. After working two hours found were gaining on leak rapidly. So ends this day.' Is that your remembrance of what was in the protest as you signed it?

"A. Yes, sir.

"Q. There is this entry in the extract from the protest which I have read to you which is not in the log, to wit: 'Men not able to stand at pumps steadily, because of the heavy seas sweeping her

decks;' that appears in pencil on the log. Is that what the notary inserted himself?

"A. Yes, sir; with my sanction. When the bilge-pump hole was stopped and the vessel cleared the weather was very rugged and continued so for the whole voyage. The first mate did the actual nailing down of this lead plate over the hole. It was never taken off again before the voyage was completed. He renailed it. I couldn't tell you the day, but on the passage. That is not entered in the log.

"Q. What was the occasion of renailing it?

"A. The weather being so rugged, he didn't nail it solid enough, and he thought something might start it again, so he renailed it all over. He did not put any additional lead over it nor any additional oakum or plug in it; there was no occasion for it. It was altered in Savannah by the mate. It still has a piece of lead over it. When he altered it in Savannah he used new and larger material."

Cross-examined:

I am 32 years old, and have followed the sea 17 years. I have been officer of a vessel about 12 years and master six years. I have been in this vessel more than four years. I have been master of her four years. I have been attached to the Morrison six or seven years, off and on—about four years continuously. I did not see any part of this cargo weighed or taken in or out. It was not weighed out.

53

"Q. Did you sign bills of lading for this cargo?

"A. I did.

"Q. Will you look at the papers now shown you and say if those are the bills of lading (showing witness papers)?

"A. Yes, sir.

"How many of them are there?

"A. Six."

Papers are offered in evidence and marked Exhibits 1, 2, 3, 4, 5, 6. Same as exhibits marked B 2, C, D, E, F, & G.

"Q. Did you have anything to do with the loading of the cargo?

"A. No, sir.

"Q. Or did the crew?

"A. No, sir.

"Q. Did you have anything to do with the dunnage or trimming?

"A. No, sir. The charterers did that, free of expense to the vessel. I have carried one cargo in this vessel of the same character for this company immediately before. This was the fifth cargo that we had carried for them in succession, four different from this one, to Charleston and back to Weymouth. I had discharged them in good order.

"During my experience at sea I had never known so rough a voyage. Although the log book states correctly what is in it, it does not begin to give the entire history of the voyage. There were a great many facts that were not mentioned there at all. The vessel carries a spanker, mainsail, foresail, forestaysail, jib, flying jib,

outer jib, foretopsail, maintopsail, and mizzen-topsail. On the night before I discovered this 18 inches of water in the hold
54 we were laying to under two-reefed mainsail and forestaysail. That is all the sail we had on. The state of the weather was very bad. The sea flooded our decks continuously, washing everything movable about the deck.

"Q. You say there was a list to port?

"A. This was afterwards—after we wore ship.

"Q. I thought when you were laying to you had a list to port?

"A. We were laying to on the port tack, and we wore ship, and then she had a list to port. Her decks were under water while we were laying to that night. We were flooded continuously. The reason why I sounded the pumps at five o'clock was because I thought they had been pumping longer than they ever did before, and I thought something must be wrong. During that time we took in water all over the ship. It went into the forecastle, and the cabin was flooded.

"Q. Was there any time until you laid to, after you get the chance to pump, up to the time when the deck was free or clear, that you could discover the loss of this bilge plate?

"A. No, sir.

"Q. At that time did you suspect at what point you were taking in the water?

"A. No, sir.

"Q. Didn't know where the leak was?

"A. No, sir. She was working heavily in the sea; she was settling fast.

"Q. How long was it after you wore ship and laid to that the decks became so far cleared that you could see the deck?

"A. Should say from ten to twenty or thirty minutes. Then this hole was discovered.

"Q. During that time what had been swept off your decks?

"A. The forecastle door had been washed off, and the
55 galley door, and the forecastle door was finally washed away, and a lot of coal was washed about the decks. At the time the absence of this bilge-pump plate was discovered I was on deck. At this time she was laboring less than she had been; the wind had abated. When we laid to we were under two-reefed foresail, storm-trysail, and forestaysail. That kept her somewhat on an even keel.

"Q. Was the bilge plate all gone?

"A. Yes, sir; the cap that screwed into the bilge plate was gone, so that in taking the bilge plate the cap went with it and the screws.

"Q. Do you know whether these screws were large or small?

"A. I think they were two-inch or two-and-a-half-inch screws; I won't be positive. They are strong enough to hold it. These bilge plates corresponded in size. One is still on the starboard side.

"Q. Will you describe the holes out of which the screws came?

"A. Well, as far as I see, it looks as if they were torn right out; very jagged; torn right out. I had examined both of these bilge plates the day I left, and their appearance was good. During the

time I was in the vessel I never had any trouble with those bilge plates; I had never used that bilge pump at all. There was never any pumping there at all. If we had had occasion to use that bilge hole we would have used force pumps, which we had on board to use if occasion required. It was the well that was covered. The size of those bilge plates was three and a half inches square; the cap was probably half the size. During that voyage the vessel took in water all over.

56 "Q. I mean so as to get into the hold.

"A. Amidships. Her water-way on the starboard side I discovered had started off, and the water had forced its way down through rapidly. We took in water through the cabin, and I discovered the next morning that she had made a hole in her mast coating by the working of the wedges. I do not remember the day I discovered that. It was after I discovered that the bilge-pump plate was gone.

"Q. From the time you stopped this hole again which led to the bilge well, was there any time after that when she did not make water?

"A. No, sir.

"Q. Was there any time after that when you found it difficult to clear her?

"A. Well, yes—that is, difficult to clear in the time. During these gales I pumped every fifteen minutes after I discovered the hole. To secure the mast I drove the wedges down and put on a new coating. When those wedges were loosened there was lots of water going down. There was a hole in the starboard scupper. I did not carry away any spars nor sails.

"Q. Then you had no conception whereabouts it was that this mass of water was coming from?

"A. I supposed she had sprung a leak under water. I thought that the bow ports might have been stove in.

"Q. Did she pound, lift, and strike?

"A. Rolled very heavily, indeed. There was no time that night up to the time after this hole was discovered, except immediately before this hole was discovered, when our decks were free

57 from water so that place could be seen. I brought cargo from Bull river, South Carolina. It was phosphate rock, one of the hardest cargoes in the world, like lead—the hardest cargo a vessel can carry. It will try her more."

Redirect examination:

"Q. Do you mean to say that the pumps were pumped every half hour after this leak was discovered?

"A. Oftener.

"Q. Every quarter of an hour?

"A. Yes, sir; fully. Of course, when we were handling sails we would have to skip a little longer.

"Q. I read you this entry of Friday, January 11th: 'Pumps attended every half hour, and find that vessel is leaking about 300 strokes per hour.' Is that wrong?

outer jib, foretopsail, maintopsail, and mizzen-topsail. On the night before I discovered this 18 inches of water in the hold
54 we were laying to under two-reefed mainsail and forestaysail. That is all the sail we had on. The state of the weather was very bad. The sea flooded our decks continuously, washing everything movable about the deck.

"Q. You say there was a list to port?

"A. This was afterwards—after we wore ship.

"Q. I thought when you were laying to you had a list to port?

"A. We were laying to on the port tack, and we wore ship, and then she had a list to port. Her decks were under water while we were laying to that night. We were flooded continuously. The reason why I sounded the pumps at five o'clock was because I thought they had been pumping longer than they ever did before, and I thought something must be wrong. During that time we took in water all over the ship. It went into the forecastle, and the cabin was flooded.

"Q. Was there any time until you laid to, after you get the chance to pump, up to the time when the deck was free or clear, that you could discover the loss of this bilge plate?

"A. No, sir.

"Q. At that time did you suspect at what point you were taking in the water?

"A. No, sir.

"Q. Didn't know where the leak was?

"A. No, sir. She was working heavily in the sea; she was settling fast.

"Q. How long was it after you wore ship and laid to that the decks became so far cleared that you could see the deck?

"A. Should say from ten to twenty or thirty minutes. Then this hole was discovered.

"Q. During that time what had been swept off your decks?

"A. The forecastle door had been washed off, and the
55 galley door, and the forecastle door was finally washed away, and a lot of coal was washed about the decks. At the time the absence of this bilge-pump plate was discovered I was on deck. At this time she was laboring less than she had been; the wind had abated. When we laid to we were under two-reefed foresail, storm-trysail, and forestaysail. That kept her somewhat on an even keel.

"Q. Was the bilge plate all gone?

"A. Yes, sir; the cap that screwed into the bilge plate was gone, so that in taking the bilge plate the cap went with it and the screws.

"Q. Do you know whether these screws were large or small?

"A. I think they were two-inch or two-and-a-half-inch screws; I won't be positive. They are strong enough to hold it. These bilge plates corresponded in size. One is still on the starboard side.

"Q. Will you describe the holes out of which the screws came?

"A. Well, as far as I see, it looks as if they were torn right out; very jagged; torn right out. I had examined both of these bilge plates the day I left, and their appearance was good. During the

time I was in the vessel I never had any trouble with those bilge plates; I had never used that bilge pump at all. There was never any pumping there at all. If we had had occasion to use that bilge hole we would have used force pumps, which we had on board to use if occasion required. It was the well that was covered. The size of those bilge plates was three and a half inches square; the cap was probably half the size. During that voyage the vessel took in water all over.

56 "Q. I mean so as to get into the hold.

"A. Amidships. Her water-way on the starboard side I discovered had started off, and the water had forced its way down through rapidly. We took in water through the cabin, and I discovered the next morning that she had made a hole in her mast coating by the working of the wedges. I do not remember the day I discovered that. It was after I discovered that the bilge-pump plate was gone.

"Q. From the time you stopped this hole again which led to the bilge well, was there any time after that when she did not make water?

"A. No, sir.

"Q. Was there any time after that when you found it difficult to clear her?

"A. Well, yes—that is, difficult to clear in the time. During these gales I pumped every fifteen minutes after I discovered the hole. To secure the mast I drove the wedges down and put on a new coating. When those wedges were loosened there was lots of water going down. There was a hole in the starboard scupper. I did not carry away any spars nor sails.

"Q. Then you had no conception whereabouts it was that this mass of water was coming from?

"A. I supposed she had sprung a leak under water. I thought that the bow ports might have been stove in.

"Q. Did she pound, lift, and strike?

"A. Rolled very heavily, indeed. There was no time that night up to the time after this hole was discovered, except immediately before this hole was discovered, when our decks were free

57 from water so that place could be seen. I brought cargo from Bull river, South Carolina. It was phosphate rock, one of the hardest cargoes in the world, like lead—the hardest cargo a vessel can carry. It will try her more."

Redirect examination:

"Q. Do you mean to say that the pumps were pumped every half hour after this leak was discovered?

"A. Oftener.

"Q. Every quarter of an hour?

"A. Yes, sir; fully. Of course, when we were handling sails we would have to skip a little longer.

"Q. I read you this entry of Friday, January 11th: 'Pumps attended every half hour, and find that vessel is leaking about 300 strokes per hour.' Is that wrong?

"A. It is right. This forecastle door was washed away a number of times, and it was finally all smashed up. I don't know the date when it was first washed away.

"Q. Was it the day the bilge-pump plate was found off?

"A. Yes, sir.

"Q. Saturday, January 12th, I read from the log, middle part: 'Vessel laboring heavily and shipping lots of water. Washed door off forecastle and filled it with water.' Do you mean to say that is wrong?

"A. That is right.

"Q. When was it you discovered the hole in the scupper?

"A. I think the next morning we discovered it. We discovered it in the midships scupper on the starboard side. The hole was in the lead. The scupper is lead, inserted through the wood—lead pipe—from the inside of the vessel to the outside, through her side below the water-ways. The hole was in the centre of the pipe. It
58 is a long pipe, all visible—you can see the whole of it. It runs right out through under the water-way. You can't see the whole of it; you can see each end of it. The hole was in the centre of the pipe, the middle inside of the opening in the lower side of the pipe—say, an inch hole. The diameter of the opening in the scupper is three inches; that was found, I think, the next morning; that was on the starboard side.

"Q. I read from the entry of January 12th: 'Found a hole in the lead in the scupper on the main deck; stopped scupper up.' Is that correct?

"A. Yes, sir.

"Q. When was it that you discovered that the mast wedges had worked?

"A can't remember the date without referring to the log book.

"Q. Didn't you make a very thorough examination as soon as you got this water out of the hold to find any leaks?

"A. Yes, sir; then it was night and you couldn't make a thorough examination.

"Q. But the next day didn't you?

"A. We made a thorough examination as far as we could; examined around the masts as far as we could. There was no evidence of any leakage then around the masts that we could see. I think there was a little hole in the coating and we sewed it up.

"Q. Was that entered on the log?

"A. I don't know.

"Q. I read from the log Tuesday, January 15th: 'Found that the wedges around the mainmast has started up and made a hole in the coating, causing a leak; drove the wedges down solid.' Was there any other hole closed up around the masts?

"A. No, sir.

"Q. What time of day was it that you wore ship on the
59 day you discovered this heavy leak?

"A. I think daylight; I don't know the hour. I discovered the 18 inches, I think, about five o'clock in the morning. I

wore ship probably half an hour after that, and wearing ship brought the vessel nearly upon an even keel again.

"Q. Which pump were you working at when you discovered the 18 inches?

"A. The after pump, situated on the poop deck—the diaphragm pump. They couldn't go to the other pump; freed the vessel with one pump. My vessel is, I think, 150 feet or more long. Her breadth is 33 feet 6. The depth of hold of the Morrison is sixteen feet. She has bulwarks and a forecastle and a poop deck. The forecastle deck is three feet above the main deck. The bulwarks extended between the poop deck and the forecastle—tight bulwarks, nearly three feet high.

"Q. Anything carried away from the bulwarks?

"A. Planks. I don't think there is any entry of this in the log or protest.

"Q. Whereabouts?

"A. On the starboard side.

"Q. When were they carried away?

"A. I think the day we discovered the leak.

"Q. After the discovery?

"A. Before.

"Q. Any certainty about it?

"A. I think so. I don't think there is any entry of that in the protest. I intended to give a true account of the voyage in the protest, but not a full account—a true account as far as we went.

"Q. What part of this bulwark was carried away on the starboard side?

"A. The centre part, you might say, nearly the centre part.
60 I mean some of the planking off the bulwark. They vary in size. The mate repaired it with boards; it has not been repaired since; it remains in the same condition. I did not find any cap or any plug or any screws on deck after I got the vessel on an even keel.

"Q. Was the wood of the water-way rotted at all?

"A. I don't think so. It don't look so at all. It held the nails for the lead. They were probably two-inch cut nails—an inch and a half. When a man is in a hurry he takes anything he can get. They were common cut nails. That water-way is of hard pine—yellow pine. They were what you call logs—seven or eight inches. The hole through it where the bilge pump was is about three to four inches large. The size of pipe or force-pump they put down, it is three-inch pipe, I think. The hole through the water-way I think is square. I won't be positive. In fact, I never saw the plate off before this time, and this time was in such a hurry that I didn't examine it. I didn't see it when the mate repaired it again in Savannah."

Recross-examination:

The usual length of a voyage from Weymouth to Charleston or Savannah is a month and a half. A trip is anywhere from seven to fifteen days.

It is my recollection that before the 12th, which is mentioned there, the forecastle door had been washed away and the galley door also. That was done, I think, before this leak was discovered. Our heavy weather commenced, I think, on the 7th or 8th. After that it was pretty much continuous the whole voyage. The men could not stand at the 'midships pump because it was flooded
61 with water—sea sweeping over continuously. The water that came on our main deck went off through the scuppers and through the port. We took a good while to clear the deck. Those were tight bulwarks. The port through which it had to go was a foot square. It was washed away. There were two, one on each side. They were situated right at the break of the poop, right over the bilge plate.

Redirect examination:

"There were four screws in this plate. They were torn out. I had an opportunity to count how many screws there were at any time. I found they were torn out when I found the hole. I had no time to put anything down to find out whether the screws had broken off in the holes or were torn out.

"Q. You had time to observe they were torn out?

"A. Yes, you could see that.

"Q. What was the diameter of those screws where the screws were torn out?

"A. Quarter of an inch, perhaps; I couldn't tell.

"Q. Wasn't there nine feet of water in the hold?

"A. Well, we say seven feet. Of course, in sounding a vessel you can't tell exactly how much water there is. When she rolls the water will run up the rod, and you can't tell exactly. I have no recollection that that figure 7 was changed from the figure 9 in the log book. I made that sounding myself. The water-way was three and a half inches above the deck. This bilge plate was right by this port, probably two inches away from the bulwarks. I do not know how wide that water-way is. The plate is nearly four
62 inches square.

"Q. Less than that?

"A. I never measured them; I couldn't tell. I don't know how much water I had in the hold when I wore ship; I should judge a good deal more than 18 inches."

Due proof was made of the incorporation of libellant under the laws of Massachusetts in 1872, and that it has since that time done business as a corporation.

Mr. Black offered in evidence the deposition of ROBERT S. BRADLEY, a witness for libellant, who testified as follows:

I am treasurer of the Bradley Fertilizer Company. The principal business of that company is manufacturing and selling commercial fertilizers. The company shipped cargo on board the schooner "Edwin I. Morrison" on or about January 2d, 1884. I here produce the bills of lading for the same.

Witness produces papers, which are marked Exhibits C, D, E, F, and G.

Mr. Black offers in evidence certified copy of protest, marked Exhibit I.

GEORGE W. ROSEVELT, sworn and examined as a witness for the libellant, testified:

I am a shipwright; my firm is Rosevelt & Griffith; that has been my business for thirty-four years. I am familiar with the way bilge-pump plates are inserted in vessels.

"Q. Take the case of a vessel which had a bilge-pump plate from three to three and a half inches square with the plug in the centre opening about half the size, removable by a two-pronged
63 screw-driver set in a yellow-pine water-way of a vessel about amidships, close to the bulwarks, that yellow-pine water-way being from six to eight inches thick and the plate screwed on with four screws about two inches long, how much hold would that plate have in sound board?

"A. That would depend on the length of the screws and how they were put in. If the screws were the proper length the plate would be hardly apt to be lifted out by any force. There is not any working of a vessel which would cause such a plate to work loose in a log water-way of that description; there is no work to the water-way on top, unless it comes on a joint.

"Q. What do you mean by properly fitted?

"A. We will suppose the screw is half an inch long. It wouldn't hold like one that was one and a half. A one and a half inch screw would hold probably any length of time, and a half inch screw might be easily torn out." The proper length to hold such a plate as has been described was an inch screw or an inch and a q*a*urter. If it were a two-inch screw it would hold stronger. If the holes in which the screws were put were a little large they would not be put in properly. If the hole were too large they would come out easy enough. If the wood weren't sound the effect would be the same as if the hole were too large—nothing to hold the screw.

"Q. Have you any experience as to what hold a screw has in sound wood—that is, when properly set in—in a hole properly dimensioned with reference to the size of the screw. Can you pull out a screw of that kind before the screw will break out?

"A. Not without turning it back, if it is put in properly. A screw put in properly is one of the best fastenings we have; but to
64 get that screw out you must turn it *ab*ck the same as to turn it forward to get it in, if the wood is good and the hole the proper size. I have done repairs on a great many vessels. I have never known a bilge-pump plate to come out of a water-way by any sea peril within my experience. I don't remember any. We seldom put in bilge pumps now in water-ways—scarcely ever. I haven't seen it for years. We now put it down where the centre main pump goes. We pump from the centre of the vessel. I don't know

when I have seen a bilge pump operate through the plank, sheer, or water-way. They were put in in former times.

"Q. In a vessel eleven years old, with a hole cut through the water-way for the bilge plate and suction hose to go down through, would there be a tendency to decay within that period in such a vessel in that part?

"A. Probably there would. I never saw the hose put down a bilge pump like that, that I know of.

"Q. What way have you seen them put in?

"The COURT: I must exclude all testimony as to how other vessels put their hose in. This is the way this vessel was built and it can't be claimed it was an unseaworthy mode of structure.

"Q. Do you know how the scupper pipes pass through in the construction of vessels?

"A. I am familiar with it. The scupper pipes are lead, anywhere from three-eights to half an inch thick. Half an inch is probably the size.

"Q. Is there anything in the working of a vessel to cause a hole in the scupper pipe in the interior between the ends on the lower side—a hole of an inch?

"A. No, sir; not that I know of. The scupper passes immediately under the water-way or through it. I have known holes in
65 the scupper pipe caused by punching a bar through to clear the pipe when the pipes get obstructed. A schooner of 534 tons register, sixteen feet depth of hold, about 150 feet long and thirty-three feet wide, would have in ordinary construction under her keel from two inches up to ten inches of shoe or false keel. Ordinary shoes are about three or four inches.

"Q. How much of a keel from the bottom of the keel up to the timber, the frame, the floor timbers?

"A. About sixteen inches or fifteen inches; anywhere along there; sometimes less. From the bottom of the frame sometimes they put twelve inches and a thicker shoe under; from the bottom of the garboard streak to the bottom of the shoe. It would depend upon what trade she was in. Sometimes they want shoal water and put on less keel. Ordinarily, I suppose, it would be fourteen inches. I should think that would be about a fair thing; fourteen or sixteen. The garboard streak would be from four to seven or eight inches thick. Her floor timbers up and down would be moulded, I presume, twelve or thirteen inches; fourteen, maybe; her ceiling inside from four inches up. Her bilge streaks might be twelve and her ceiling four inches.

"Q. She had timbers about eight inches?

"A. Eight inches on the keel is too small for a vessel of that class. I don't think they would mould there at that.

"Q. But supposing she had eight inches?

"A. They might be eight-inch sided, but I think they would mould them heavier than that.

"Q. The testimony is, between the planking and ceiling was eight inches of floor timbers in depth. How much would be the

proportionate size for the garboard streak, ceiling, and outside keel and shoe?

66 "A. I have given you the ordinary thickness of what it should be. The plank outside the bottom might be three or three and a half for a vessel of that class, and thicker as she went above; the wales probably four, four and a half, or five inches. It depends upon how much timber they want to put on.

"Q. With eight-inch timber, I say, how thick would the garboard streak be?

"A. I presume they put on the same thickness of garboard that they want to, but probably five inches would be the extreme.

"Q. How much ceiling?

"A. That would run about the same proportion; might be three, five, and so on; it graduates; the flatter the floor of the ceiling is, the thinner; then it comes to the bilges thick; the more strength is put in the bilge."

Cross-examined by claimants' counsel:

I have never commanded a craft, nor been to sea as a sailing man.

HERBERT LAWRENCE, being duly sworn and examined as a witness for the libellant, testifies:

I am a ship-builder; my firm is Lawrence & Foulks. I have been at my business forty years, nearly.

"Q. Do you know of the use of bilge plates with the openings for the pump in the construction of vessels?

"A. I never saw one of this kind of plates put on bilges at all (referring to the bilge plate in court); I know what they are for.

"Q. You have used such things?

"A. I have put plates on plank sheer in the shape of ventilators, but not of that kind.

67 "Q. Take the case of a plate from three to three and a half inches square, with an opening of half the size, with holes for four screws, which plate is set in the plank sheer of yellow pine from six to eight inches thick, about amidships, under the rail close to the bulwarks, within an inch or two inches of the bulwarks, and screwed in that position with four screws about two inches long, set in flush with the water-ways, what sort of strain would it require to take out such a plate if the wood were sound and the screws properly set?

"A. It would take considerable strain. I think the screws would hold on if the plate would break out; the screws would hold on if they were put in properly.

"Q. Do you know how strong the hold of a two-inch screw is in sound wood when screwed into a hole properly adjusted to the size of the screw?

"A. I do not.

"Q. Do you know whether such a screw would break off before you could pull it out?

"A. Is that the sample plate you have?

"Q. Yes.

"A. May I see it?

"Q. (Handing the plate to the witness.) This is a plate which corresponds to the description given by the captain. I am asking about the hold of the screw in the wood.

"A. I think if properly put in it will stay there—the screw would—when the plate was out. If the screw-holes are too large for the size of the screw the plate would get out very easy.

"Q. If the wood is eleven years old and rotten?

"A. The result would be about the same as if the screw were put into a hole an inch and a half diameter; it would slip out.

"What is the usual life of yellow-pine water-ways with openings such as are made to let in such a piece of metal at that point; what would be its condition, in your judgment?

68 "A. The plank may be good in eleven years where this went through, but if it pulled out it would be an indication of something wrong: either the screw was slack or the wood was rotten. There is nothing in the position of such a plate in such a water-way which should be affected by the working of a vessel or the rolling and pitching of a vessel. There is no work where this thing goes. I am familiar with the use of scuppers; we put them in.

"Q. Could you say whether there would be anything in the working or laboring of a vessel which would cause a hole in the middle part of a scupper pipe three inches in diameter, which passes from the inner side to the outside of a vessel?

"A. Partly under the water-way and out? No; it would be impossible to do it. It would be impossible to make a hole in that scupper by the working of a vessel.

"Q. Have you known of holes being found in lead scuppers?

"A. I never saw one.

"Q. Have you ever gone to sea yourself?

"A. No, sir; I am a landsman."

Cross-examined by claimants' counsel:

"Q. You don't know anything about bilge plates?

"A. No, sir; I never saw one, and I guess a great many men in the business never did either. It would be impossible to make a hole in that scupper by the working of a vessel."

THOMAS H. MORTON, being duly sworn and examined as a witness for the libellant, testifies:

I have been a shipmaster for twenty-six years. My last command was eight years in the Pacific mail, commanding steamers of that line, running from here to Aspinwall; before that in different steamship lines—to Savannah, New Orleans, and previous to
69 to that in command of sailing ships. I have had 21 years' experience in passing up and down the coast.

"Q. Do you know the use of such bilge plates with caps as have been described here—three or three and a half inches square, set in a water-way flush with the deck and screwed fast in about amidships of a vessel?

"A. I never saw one in the water-way. I have seen bilge plates, in the deck plank close to the water-way. I never saw one in the water-way.

"Q. In the particular case we have before us this bilge plate, from three to three and a half inches square, was set in the water-way flush with the water-way and held by four screws. There was an opening in the centre of the plate on which there was a cap screw and when that was off there was an opening through the water-way down into the bilges of the vessel between the plank and the ceiling. The water-way was from six to eight inches thick. The plate was located about amidships, close to the bulwarks, under the rail of the vessel. Would there be, in your experience as a mariner, anything in the working of a vessel, the straining or pounding, which would break loose that cap and plate?

"A. No; I think not.

"Q. Why not, if it is properly screwed?

"A. Where it is put into a solid piece of wood, and particularly in the water-way, I can't conceive any way that plate would come out at all—not by the working of a vessel. I never knew a water-way to work any way.

"Q. Did you ever know of a cap coming out by sea peril or any other way?

"A. I never heard of any such thing. I am familiar with scuppers on board of sailing vessels.

"Q. Do you know whether there would be anything in
70 the sea perils of ordinary or extraordinary dangers of navigation which would cause a hole to be made in a lead scupper about an inch in diameter, about midway of its length, in the lower side by the working of any extraordinary or ordinary peril of the vessel?

"A. I never saw any.

"Q. Is there anything in the working of a vessel which could break the lead in that position?

"A. No, sir; not in the middle. I have seen a hole repeatedly made in scuppers by the scupper getting blocked and taking a bar or something or other to punch it through. I have seen it frequently done, and have had it repaired afterwards.

"Q. This schooner was about 530 tons register. She was loaded with 756 tons of guano, in bags and bulk, the bags being in the lower hold and the bulk between decks. She then drew 16 feet 7 inches. Could you, from your knowledge of vessels, state how much free board such a vessel, loaded so deep with that depth of hold, would have amidships?

"A. That would be according to her depth of keel and planking and frames, which would have to be added on to that depth of hold. The depth of hold is generally taken to the top of the ceil-

ing, and you have to add on the frames and keel and outside planking and inside.

"Q. How much would add to that 16 feet depth of hold to get at the entire depth to the bottom of the keel or shoe?

"A. The ceiling would be about four or four and a half inches in a vessel of that size, possibly five; the frames I don't think would be over eight inches; the garboard would be probably four or five inches, and the keel will—this is a schooner, a centre board, I suppose?

"Q. She was a three-masted schooner. We have no in-
71 formation to show whether she had a centre board or not.

"A. The keel would depend very much on that."

By CLAIMANTS' COUNSEL: She was not a centre board.

"A. (continued). She would probably have been about eight or nine inches keel outside of the planking altogether. The shoe would probably be an inch and a half or two inches.

"Q. That is 29 inches to be added to the 16 feet depth of hold, which would make 18 feet 5 inches?

"A. And her draft was 16 feet 7 inches? I never heard of a vessel being loaded that way to go to sea. What time of year was it?

"Q. January.

"A. I never knew a vessel to go to sea loaded as deep as that. Taking off the 16 feet 7 from the 18 feet 5 would leave 1 foot 10 as a difference—that is, amidships. There is a crown on the deck of the vessel running athwartship. A vessel of thirty-three feet breadth of beam would have four inches. That crown brings the side lower than the centre of the vessel. That would make one foot six at the side. Assuming that this vessel was bound down from Weymouth to Savannah in the month of January, and that she had one foot four inches—or thereabouts—freeboard, I wouldn't care about going in her. The rule is about three inches for each foot depth of hold for freeboard. That would make four feet freeboard for this vessel."

When she listed so she is two streaks under water, that would be about 12 inches. Her plank is about six inches wide.

JANS WILLETSEN, being duly sworn and examined as a witness for the libellant, testifies:

I have been a shipwright since I was 15 years old. I am 44 now.
I am in partnership—Willetsen & Jansen. I have gone to
72 sea as ship carpenter about ten years. I learned my trade in
Denmark. I know of the using of the bilge-plate pumps on vessels.

"Q. Take the case of a vessel which was eleven years old and which had a bilge plate anywhere from three to five inches square set into her water-way, which was five to six inches thick, of hard pine, which was fastened by four screws from an inch and a half to two inches in length, and which was under the rail amidships, close to the bulwarks, would there be anything in the working of a vessel in a sea to loosen that plate if it were porperly fastened?

"A. No, sir; I should say not.

"Q. If that plate came off, taking with it the four screws which fastened it, what would you say would be the cause of its coming off—the reason of its coming off?

"A. The screws must have been loose or the wood decayed around the screw; then it would be possible for it to come out.

"Q. As the vessel rolls which has some water in her, does the water run up the sides and bilges of the vessel between the frames?

"A. Yes, sir.

"Q. If the wood was eleven years old with these screws in it, what would you say would be its natural condition at that age, this yellow pine that has been on a vessel going to sea eleven years?

"A. The yellow pine would begin to decay before that age, but that wouldn't be all. With these brass screws verdigris forms around them and they get loose. These plates are fastened with brass screws."

The COURT: That doesn't appear, does it, that they were fastened with brass screws?

Mr. BLACK: The captain stated they were brass or composition.

73 "Q. If they were iron screws, what would be the result, then, in eleven years?

"A. An iron screw wouldn't last one year.

"Q. If it were an iron plated with zinc?

"A. Galvanized do you mean?

"Q. Galvanized.

"A. It might possibly last two years, then, not over; galvanizing doesn't stand long. I have never known a plate of that kind to come out of a vessel at any time. I have known pretty rough weather in my navigation—all kinds of weather—and with vessels that had such plates in them. I know how scupper pipes are put in vessels.

"Q. Suppose a scupper pipe about 18 inches long, running from the inside to the outside of the vessel, about three inches in diameter, had a hole about midway of it on the lower side punched through about an inch in diameter, would you say there could be anything in the working of the vessel in an extraordinary or ordinary sea that could make such a hole in the scupper pipe—anything in the navigation of the vessel or the seas?

"A. These pipes are lead, and that lead might possibly decay.

"Q. I am not talking of decayed pipes, but if the scupper pipe were sound?

"By the COURT:

"Q. Is there anything in the working of the ship to make a hole in it?

"A. No, sir.

"Q. Do you know how firm a hold a good screw, properly set, has in sound wood?

"A. Well, a screw two inches long will break that plate or else

tear the head of the screw before it will let go. That I am positive of, if the wood were sound.

74 Cross-examined by claimants' counsel:

"Q. Have you ever seen these pump plates actually constructed? Did you ever make one or put it on a vessel?

"A. Yes, sir; I have seen them put in. I can't say how many. For a plate of that size I should use nothing less than an inch and a half screw. I couldn't say how many of these bilge plates I have set in a vessel; dozens probably. In the four I recollect I used nothing less than an inch and a half, heavy screws. They were bigger plates than those. I used brass or composition plate. I went from China to Callao, and was three months on board before that on a vessel that those screw plates were put on. I put them on in China. We had a good deal of free board. We carried nothing but ballast.

"Q. Have you — any trouble with them at any time?

"A. No, sir.

"Q. You never knew in your experience any trouble with them?

"A. Never happened to have any come off.

"Q. Pump plates put on that way, with inch and a half screws of any kind?

"A. No, sir.

"Q. Have you ever had any trouble with your scuppers?

"A. No, sir; not while I went to sea. I put in lots of scuppers here. Where vessels had the scuppers broke I have replaced them and put in new ones, but I never did it where a vessel went to sea. I did not know how those scuppers were broken."

75 Elizur H. Atwood, being duly sworn and examined as a witness for the claimants, testifies:

I call myself a merchant. I am agent for several vessels, and I attend mostly to that business.

I know the schooner the E. I. Morrison. I contracted to have her built, and I saw her while she was being built. This screw pump plate was probably about a five-inch plate, five inches square, and the coupling, the opening, is a little raised on that, so that it don't screw down; but the plate sat flush in the vessel. When she was in frame, timbered up, this plate was put on, so as to conduct those holes down between the timbers, and when the vessel is carrying light cargo you can draw the water out from the bilge when she careens over. That is the only time we want to use it. This plate was about four or five inches, and put in for that purpose. Her timber is about twelve or fourteen inch mould. This square plate sat in the water-way, flush with the water-way, fastened to the water-way with brass screws from an inch and a half to two inches; I couldn't say now, it has been twelve years since I saw them. I should judge they ought to be about that size.

"Q. What about those holes those screws went into, if you know?"

Objected to, that unless this witness put them in himself he is hardly competent to testify whether they were driven in with a tight hole or not.

"A. I caused them to be put in, and saw the plate after they were put in. I can't remember whether twelve years ago I saw the man screw them in or not; but that was the order given,
76 to put them in properly. I saw the plate on and examined it. It was properly put on. There was a circular hole. I should judge it was three inches—might be three and a half; that hole was made to put the suction hose down. We have a portable force-pump on deck, and it was to take that suction hose in the bilge and drive the water out of the bilge when she is lightly loaded. We had our regular pumps in addition to that—two syphons and a diaphragm. When that was not being used a cap on the hole screwed on tight. When that cap was screwed on tight it projected a little above the plate—I should think an eighth of an inch. The scuppers were lead. I know of other vessels having these bilge pump plates arranged — constructed as the Morrison's was. I have put it in at least half a dozen, if not more. There is a vessel in Boston now that I put them in sixteen years ago, and it is in perfect order. The scuppers were put in as usual.

"Q. In respect to this water-way, the material, was it old, or strong, or rotten, or what?

"A. Considered in perfect order; never has been touched since that time; in perfect order to-day.

"Q. How long has the Morrison been running, carrying cargo?

"A. I think this is her twelfth year. When this accident occurred I think she was ten years old. I have seen her from time to time and noticed with respect to these bilge pump plates. I always go aboard from once to twice a year and look all over her. When I did go aboard and look at her and the bilge pump plate I found everything in good order; and the scuppers, I found nothing
77 loose about the bilge plate, nor any holes about the scupper. I last saw these bilge plates before the voyage in question—I think in September. Then she was on the way and I examined her.

"Q. Including the plates?

"A. We gave a slight glance at the plate. We considered that permanent.

"Q. Did you look to see?

"A. I look at all those things around occasionally.

"Q. Whether or not at that time, in your judgment, that vessel was seaworthy, capable of carrying such a cargo."

Objected to. Objection overruled.

"A. She was.

"Q. What was the object of your examination in September?

"A. When those vessels are on the ways I go on board particularly to examine the rudder braces and see that the bottom is in perfect order, properly caulked, and to look at the sales and rigging. I make a special survey once a year, and I go aboard at other

times to determine whether she is seaworthy. I did this in September or August. I have been master of vessels twenty-five years—most of the time.

"Q. In the month of January, from your knowledge of the Morrison, what would you say as to her being capable of carrying such a cargo as she had—766 tons of this phosphate—from Weymouth or Boston to Charleston?

"A. Her coal capacity is 840 tons, and she had 756 of guano. That is not her full loading capacity within some eighty or ninety tons. I have heard what has been stated about the freeboard. I know her depth of hold; I think she is some 10 feet in the lower hold and six between decks.

"Q. It has been stated here that the rule is three inches of freeboard to each foot of hold. Is that the proper rule?

78 "A. I think it is. That is an English rule, I think. With four feet of freeboard I wouldn't consider her overloaded in any way, inasmuch as she has a poop aft. The height of the poop was, I think, about three feet or a little more. She has been chartered to the Bradley Fertilizer Company for a number of trips, carrying this kind of cargo without any difficulty at all; no complaint made at all. The screw plate was not found at all.

"Q. In your judgment as a mariner, what causes would tend to carry this plate away?

"A. I should say in heavy weather, in my judgment, there must be something—some stick or fender or something of the kind—that must have forced against it. Then, of course, the current washing as it does in the vessel's lee waist a man in a gale of wind could not stand down there; it would carry him back and forth, and there might be some of the wrecked stuff that might hit it and cause it to start up.

"By the COURT:

"Q. I understand your answer to the question to be that it was nothing in the navigation or working of the ship, but only from something in contact with it—that something got loose and knocked against it in some way?

"A. I think so. The scuppers were a little oval; I should think three inches wide at the top; possibly three and a quarter. The scupper goes right through the side of the vessel. I should think at the deck they would be about three inches; they would be a little flattened, you know. Whatever they flatten would make it less; probably two or two and a half; possibly a three-inch scupper. The scupper goes right through like that—on a slant—to allow the water to escape right through between the timbers, and the

79 planking is this side and the ceiling this; probably it is as long as that, I should judge—an eighteenth scupper; might not be quite as long, but it goes down slanting, I should think, about an angle of 25 degrees; enough to let the water escape. The outside was possibly six inches or more lower than the inside. I should hardly think it was eighteen inches long, but it might be. It is perfectly straight, only it slants down.

"By Mr. WILCOX:

"Q. Has this vessel been carrying this kind of cargo ever since?

"A. She has carried one cargo and is now on the second one. She has carried a number of cargoes, and in the coal trade in the summer. She has carried her cargo since perfectly safe—no complaint; not for the same concern, the Bradley Fertilizer Company; she is sailing from this port now. She had carried cargoes for that company before this accident, but I think not after.

"By the COURT:

"Q. You may state anything you may consider bearing upon it for the exemption of the vessel as to any presumption of a failure to equip herself for such a voyage at such a time of year.

"A. She was in perfect order for such a voyage, and she has never had anything done but some caulking since. She passes inspection.

"Q. How about her construction?

"A. She is twelve to fourteen inches deep—her floor timbers—so between the ceiling and the outside would be just that difference. The outside planking is twelve inches, and then the garboard streak is seven inches—seven or eight; I think one is seven; then her keel is some sixteen inches below that, making a depth from the skin to the outside planking timber twelve inches; then seven; that
80 is nineteen and sixteen added—about thirty-five."

Cross-examined by libellant's counsel:

The ceiling on the floor is about three inches and a half or four. As it comes up into the bilges it is seven or eight.

I am an owner in the vessel and was at this time.

"Q. Were any repairs done on her after she came back from this voyage?

"A. Not anything in particular, only we have her caulked whenever it is necessary." They had slight repairs in Savannah, but nothing but slight: have constant repairs going on. I never sailed in her. My attention was never specially called to these bilge plates. There was nothing peculiar in them to call my attention to them. We give a general oversight. We consider them permanent when they are put in. I have other vessels in which they are used.

"Q. You say that bilge cap which screws into the bilge plate was about an eighth of an inch higher than the plate itself?

"A. That is my judgment, as far as I remember.

"Q. Was it an eighth of an inch square at the edge or flared down?

"A. Rounded off; not exactly even, but rounded off a little; not exactly even.

"Q. Anything that came against it would glide over that round, wouldn't it?

"A. Depends altogether upon how it struck the thing. That was the general form (referring to claimants' exhibit) of the plate I described, only ours was much larger than this. I think the cap was

rounded off about like that. I couldn't swear, so many years ago. It was unscrewed by means of a two-pronged screw-driver set into these holes.

81 "By the COURT:

"Q. The edge was rounded off like the edges of that model?
"A. Yes, sir.

"By Mr. BLACK:

"Q. Did you ever examine the screws that were put into these bilge plates on this vessel?
"A. No, sir; they never had been started for twelve years. It is twelve years now; ten from the time that the accident occurred. I have never seen that cap unscrewed so as to take it off. We don't use it much.

"By the COURT:

"Q. Did you see the hole after the cap and plates were gone?
"A. No, sir; the hole is plugged up and then coppered over with good, solid metal or something of that sort. It has never been re-capped since. We don't use it now. The starboard one is left. We consider it perfectly safe. She is running with it now.
"Q. Have you examined that one?
"A. Just merely glanced at it. I consider it just as safe as any other part of the vessel. I have no knowledge of the cap being unscrewed for five years, or since the accident to the port one. The vessel was carrying cotton a great deal, going across to Europe, &c., and we put this in to draw the water out of the bilge. Since they have gone into the coal trade they get the bilge kind of full of dust, so that the bilge pump becomes impracticable. You could not get it down to draw much out, so it hasn't been used for years.
"Q. Since this accident with the port bilge hole, where the water got in, have you ever examined the starboard one? Do you know whether that is in condition to meet with a similar catastrophe?
"A. No.
"Q. You have not heard of its being examined?
"A. No, sir; not thoroughly. I am the managing owner,
82 to look after repairs made to this vessel."

Redirect by claimants' counsel:

With the amount of cargo this Morrison had on at this time, I should think ordinarily she ought to have from three and a half to four feet freeboard; it is mere judgment. She wasn't fully loaded by, I will say, from eighty to ninety tons.

WILLIAM A. COHOON, being duly sworn and examined as a witness for the claimants, testified:

By Mr. WILCOX:

I was second mate of this schooner, the Morrison, at the time of this occurrence. I was on board at the time of this cargo being

laden on her at Weymouth. After the cargo was taken on board I should think she had three feet and a half freeboard; at least that.

I noticed the pump plate and cap. You couldn't help notice it every time you passed the decks. When we left Boston it was apparently in good order; nothing at all loose about it.

"Q. Had it been used or in any way tampered with while the vessel was in port at that time?

"A. Not at all at that time. I was on the Morrison two voyages before and one after. The first we carried general cargo to Charleston, and from Charleston we went to Bull river, loaded with phosphate rock, and back to Weymouth, bringing a full cargo, because there was no bar to contend with, and they loaded her full—deep.

"Q. How did the cargo correspond with this cargo of fertilizer you took on this voyage? Was it more or less?

83 "A. More. Eight hundred and fifty to nine hundred tons, I think. We had no trouble. That is what she loads when she has no bar to contend with.

"Q. Your next voyage was this from Boston with this cargo for the Bradley Fertilizer Company?

"A. This was the third voyage. We took one between—one previous to that.

"Q. Then you were on her one voyage after the Bradley Fertilizer Company's in question?

"A. Yes, sir.

"Q. What cargo did you carry then?

"A. The first cargo we took a general cargo to Charleston. The next time we brought phosphate rock back; next time we took guano to Savannah and come back, and on the third trip we took the load we are speaking of now. I was not on her any voyage after that. I left her in Elizabethport that time we come back.

"Q. Was your attention called to the condition of your scuppers that time you left Boston?

"A. Not particularly, although in painting a vessel it would be impossible to pass a place like that and not notice it, and I helped paint her three times while I was in her, and each time in painting everything on the water-ways and around the bulwarks is of course looked after and fixed. If any oakum or anything in stanchions look loose or anyways suspicious, of course it is examined and looked after, and in painting a vessel of course all these things were looked after thoroughly. They were looked after three different times while I was in that vessel and helped paint her, so that I can swear that the scuppers were in good order when we left Boston. The scuppers were in good order. The first and second mate of a vessel have the work to do, and to do it properly certainly he has to look after all those things in particular. Looking after the scuppers and pump plate is part of his

84 duty; naturally it is his duty to look after everything. She was perfectly seaworthy when she left Boston. We left Boston, on the 4th of January, in the morning, and that evening we harbored—that is, we come on the shoals, intending to come over

the shoals through Vineyard sound and go out between Block island and Gayhead and pursue our journey, the wind being ahead to the westward. We anchored on the shoals just in by the light-ship. The next morning, the wind being ahead, we went out by the south channel. Then we struck a perfect gale of wind, driving us off our course—we couldn't head our course—and driving us out to sea and into the Gulf stream. That continued for seven or eight or nine days—I couldn't say which. I have been to sea since I was fifteen and now am thirty-six, and I can say honestly I never had a worse time, worse passage, or never see worse weather—that is, to continue so long. I have seen probably for a few hours—two or five hours would be maybe a worse sea—that is, not heavier, but more settled—all up in a heap, all round, water coming from every direction. The condition of the decks was, of course, bad—that is, things that were on deck, movable-, were moved by the sea and broken up considerable; bucket racks, such things as that, washing around decks, and buckets washing around decks. The chain lockers were about eight feet abaft the windlass and in a square box—that is, the chains were one on each side, and in the middle was a coal bunker or coal locker. It would hold about five or six tons probably, and on either side were the main boxes with the chains stowed in. The covers were made of two-inch plank and then crossed right close together, the crossings like double-boarded thinner stuff, an inch and
85 a half; that would make one of them weigh probably 75 or 80 or 100 pounds—water-soaked and all that. There were two of those and between them, of course, was the part of the other cover, which was stationary, and then a door on hinges to lift up to take the coal out of the locker. But the two were eight feet long, about, and about three and a half feet wide. They weren't put on there by hinges. They were just set in. They washed off. That morning when we discovered the leak, at about five o'clock, I picked one of them covers up on deck; that is against the break of the poop, in the wake of this pump of the port. The port, you see, was right over this bilge pump in the bulwarks, right square over, and this chain-box cover was lying on deck, where the sea had washed it, between the forehouse and the rail, and come there and fetched up against the break of the poop, and there it was lying. As soon as the water ran off so as I could venture to pick it up to save it I did so and carried it forward again. With the help of the other men on the lookout we got it on the chain box again. The coal bunkers were just abaft the windlass, forward of the forehouse—what we call the galley and forecastle combined.

"Q. One of those covers washed from that place down against the poop?

"A. Down against the poop; yes, sir.

"Q. And you picked it up there?

"A. Yes, sir.

"Q. How far was that beyond the place where the pump-hole was?

"A. Right exactly—not onto it, I won't say, but——

"By the COURT:

"Q. Where you found that cover stationed, how far was
86 that from the hole where this plate goes on?
"A. Two feet."

By Mr. WILCOX:

The other cover was on the opposite side, jammed between the house and rail; about half way aft. It got partly crossways, and there was not room between the house and rail to let it come through in that direction crossways, so it jammed there. The bulwarks were stove in in several places. I picked up a piece on deck, probably seven feet long and I think about six inches wide. It would weigh fifteen or eighteen pounds or probably more. It was probably five feet away from this pump plate. It was jammed in between the fife rail that goes around the main house. It was right in the wake of it, only amidships in the vessel; jammed in between the fife rail that goes around the main house. Our galley door was washed off and the forecastle door. The forecastle door went all to pieces, and the galley door was so it could be repaired again by some trouble. These doors were five feet long and three feet wide; they were made also of two-inch plank. It is hard to tell where they went when they broke away. They might have washed overboard to be picked up with some pieces. We didn't find all the pieces of the forecastle door. We found some on deck and put them away. A bucket rack and some buckets were washed around the deck. I first discovered the trouble about the pump plate. On the 10th of January I came on deck at four o'clock in the morning. Twelve o'clock, when I went below, the pumps were sucked; the water was all out of the vessel. The mate in charge kept the decks until four o'clock in the morning. 4 o'clock he called me. When I came on
87 deck he says to me, "You better try the pumps pretty often in your watch, because," says he, "it is a terrible sea, and," says he, "we don't know, of course, with this stuff in her"—that is, he meant by that it was a hard cargo to carry—"what time the vessel might spring a leak. It is hard to tell." He says, "You better try the pumps pretty often." I passed along about half an hour, and then I called the man off the lookout onto the poop. We couldn't pump on the main deck, you understand. There was too much water and, the water coming forward and coming against the break of the poop, we couldn't get there. We would be washed overboard, and so, of course, we used the pump on the poop, and we had to tie ourselves to a hatch or the rings of the hatch then to stay there—that is, we had to tie the pump brake, because if we got washed from that pump brake and let go that would go overboard; but we had a line we could reach ourselves if a sea struck us and save ourselves, but if we let go the pump brake it would go overboard, so we tied a string to it and let it loose so we could work it. We pumped a little while and the pump sucked all right enough at first. Next time we let about fifteen or twenty minutes go past and we tried again, and we pumped and pumped till what we call

four bells—that is, six o'clock—and we got no suck, expecting, of course, every minute to get a suck on the vessel. It didn't alarm me a great deal—that is, so that I didn't call the watch; didn't call anybody or tell anybody about it, expecting every minute to get a suck. I says to the man pumping with me after the wheel was relieved—the first man that was to the wheel pumping with me, of course he hadn't much experience about a vessel, and the other was
88 a good, No. 1 A seaman—good seaman—and I says to him, says I, "Scotty," mentioning him by name, "this is kind of funny. I got a suck when we first come up and since then I can't get her dry. I have no suck." He says, "There might be something got down into the pump or something like that, in the first place; and, the vessel rolling, you got a rolling suck and thought that the water was all out." He said, Probably the mate wasn't very particular, or something like that. That was all right. After four bells we pumped till seven bells—that is, half past seven o'clock—then, of course, the watch was called. When the mate came up I told him right away, at first we hadn't got no suck on the vessel from half past four o'clock. During the run of this time the captain he was on deck once in awhile; and at five o'clock I sounded the pump—the captain sounded himself—and that wasn't half an hour, you see, after we had a suck, and there was 18 inches of water. Of course, it did not alarm him a great deal. He went below again. At six o'clock, four bells, he came up again and asked me if the pump had been sucked, and I told him no; that the pump was not sucked, but didn't amount to much or anything like that; so he went below again. I couldn't tell whether he sounded that time—the second time, at six o'clock. I was at work taking up the stuff around the decks and looking after this chain-box cover and things that were going adrift, and I am sure I couldn't say whether he sounded the pumps or not. At eight bells, when all hands come on deck, first thing we done was to go to work to pump her out, and we didn't get no suck. Presently, after this, the captain sounded again and we had seven feet of water in the vessel. Then, of
89 course, this commenced to look kind of blue for us, having seven feet of water in the vessel, loaded deep with guano, or comparatively deep, but it is a hard cargo to carry. It is a sinking cargo, and we, of course, commenced to look round—commenced to think it was our last days drawing pretty handy—and we turned up our boat. We didn't stop to unlatch her at all. I got the axe out of the steward's room and cut the lashings and turned the boat over and got everything prepared to leave the vessel, and we had two lady passengers—the captain's wife and a lady friend of hers. Of course, they prepared to leave, and come on deck to take the boat. The captain gave command to leave the wheel hard up and let the vessel pay off. Before this she had been laying too or not laying to. When he come up at first he let the man at the wheel keep her off and give her steerage-way, thinking, of course, having steerage-way, she wouldn't throw so much water—give us a little more ease, running her off free before the wind, to stand to the pumps; there wouldn't be so much water coming from one side to the other. He

said, Heave the wheel hard up and pay off on the other side. The vessel was losing steerage-way. She was getting too much heft of water, so she wouldn't steer. Her knightheads was about level with the water then. It was some time before she paid off. When she did and the booms were swinging amidships, of course she rolled this lee side out of the water. I was standing then. We had the steward there and myself and one more of the men, and we succeeded in rigging up the pumps on the main deck. So as to save life, a man will do most anything, you know; and we had our lines to keep us from getting adrift, and we were standing
90 there at the pumps on the main deck, pumping with them, and when she rolled this scupper, this lee side, out of water I heard a gurgling. Of course, water leaving a scupper will make a sort of gurgling noise, but it didn't sound like that. It sounded too kind of heavy for water leaving a scupper and it drawed my attention; so thinks I, "If I hear that again I shall go and see what it is;" so the second thought was, "In a time like this you better not wait for a second opportunity; I will go now," so I let go the pump and went over and put my hand against the rail and looked down under the sail where this pump is, of course, and there I saw the hole—a hole large enough to put my hand way down into it, in that shape. I run it down as far as that with the clothes I had on. I didn't have much clothes on in that kind of a time. I had no oil jacket or anything on, and I run my arm down and I sung out to the captain; he was on deck at this time. Says I, "Look here," and this time, being excited, of course, like that, I didn't hardly realize then what it was, because it was a thing we weren't looking for, a thing like that, so that I didn't just exactly realize at that second what had been over this hole, and he come, of course, and he says, "My God! this is the bilge pump." Of course, the whole concern was gone—the brass, the whole fixing, the square piece of brass, with the round hole into it, screwed into the water-ways. The screws and whole concern was gone. The wood where the screw was pulled out was just as white and sound as it could be—that is, where the screws were hauled out of the wood you could see—of course, in a time like that, mind you, we didn't pay so very particular attention to it, but you could see that the
91 screws had just the same as been hauled right out of the clear wood, and hauled the wood with it in the holes. The holes weren't smooth nor they wasn't black nor rusty; not anything like that. They was white, and the same as if you had hauled it out and left the splinters hanging around the edges. Then, of course, we plugged this hole up and covered it with canvas, and sheet lead over the top of the canvas, and pursued our journey—that is, after we pumped her out. There was no sail made or anything done to the vessel; no man at the wheel. The wheel was tied hard up and the sail trimmed so the vessel would lay there. We went to work to pump her out, and I think it was between eleven and twelve o'clock we got her free, got a suck, and from that time until just before we got to Savannah the vessel made more water than usual, more water than she ever did when I was in her. After we got her

free we had, of course, a rough passage from that out, and then, of course, the water being soaked into that guano made the vessel great deal deeper than she was when we left Boston; made her heavier, water-logged, and out of trim—that is, we had some two hundred bags of nitre aft in the vessel, and they, of course, being flooded with water, all dissolved away, and that brought the vessel by the head, and a worse passage or time I never saw and never want to see again; but in regards to leaking afterwards, the vessel did make more water than usual. I think it was two days afterwards the captain was walking along on the break of the poop and there was some shakings on deck—that is, rope-yarn. He says to one of the men, "Haul out them yarns out of that scupper." He says, "I see them hanging there half the day."

92 The man reached overboard and took hold of the ends of rope-yarns to haul them out, and he couldn't haul them out; they was fast. He says, "That seems kind of funny;" so he jumped down on deck and looks into the pipe—that is, after they had been taken up the opposite way—shoved up through and hauled up the opposite way—and he says, "Why, there is a hole in that pipe." That drawed attention of all hands, and we all hands examined it, and there was a hole in it. He says to me, "Go get a chain-hook," and I went and got a chain-hook; but that was too big to go in the scupper, and he takes the chain-hook and put it into a belaying-pin hole in the rail and straightened it out, and then he takes and points up the end again in the same hole and makes a shorter bend and reached that in the scupper and hauled out the rope-yarns the opposite way and hauled them out. We made a plug to fill it, and we put it in the scupper and put on sheet lead and canvas and on the outside of the vessel—on the bends we will say—and of course made it perfectly tight then, so the water couldn't get in. After that the vessel didn't leak but a very little indeed. Speaking about the masts, there was the mast wedges got loose around the mainmast. The pieces of that bucket rack of course was broke up in small pieces; it was only inch pine lumber, bored out full of holes, so it was very easy for it to break up. A piece of that could wash down into the scupper, which was natural for the water drawing out to suck it in there. A stick would go in there and something come up against it and it would shove the other end right down through the scupper; natural enough to do so by drift stuff going around decks. Rats could get at the scupper if a rat was jammed up in there and couldn't get out no other way.

93 A rat would eat himself out of any place that he is jammed up. But if he ain't jammed up and he can get out any other way, of course he will do so, but in a case like this it might be probable for a rat to be jammed up there, but, of course, I wouldn't say anything about a rat being there.

We discovered the masts working backwards and forwards.

The scuppers are expected to be kept clear to let the water run off the deck. The mast coating, if you have a canvas cover on it and it is painted—why the least work to a mast you will see hollows in it, and it will give here and there, every place where it will bring

slack. We saw that working and the mate says to me, "Cahoon, jump down between decks in the poop and see if them wedges has drawn up or what is the matter with the mast." So I went down between decks in the poop, and the wedges in the mast between decks was—a good many of them had worked up, some past the other, some two inches and some four, and so on. The working of a vessel will do that in a sea-way. And these wedges were worked up loose, and these wedges coming loose give the mast play, and that chafed several holes in the mast coating—that is, around the mast where this water, of course, being on deck, a great quantity of water would leak through these holes and go into the hold amongst the cargo; and that was fixed as soon as we observed them. I saw them from below. There might be two or three, probably, small holes in the mast coating and from on the deck, walking around, you wouldn't see them, but you go down where it is dark in a vessel's poop or anything like that, and where you haven't got anybody to hold the booby
94 hatch or anything like that, and go in there, and if there is the least hole in the mast coating, then you can see it; you will see the light shine through above you. That is the way I saw it, saw those holes, and I came up and told the mate, and we had them fixed as soon as there was a chance to do so. The condition of the mast when we left Boston was all right. Them wedges was down there solid, too—I examined them; and there ain't no person that has any experience about going to sea, a man that understands his business and an officer of a vessel, if he makes one voyage or two voyages in her and finds or thinks she ain't capable of carrying him in a rough time or bad weather, he ain't going to go in her himself; he is going to stay ashore. When we got to Charleston we discharged that cargo; found it was wet and damaged by water. We brought a load of phosphate rock back. The starboard pump plate wasn't touched at all.

"Q. The vessel has run with the starboard pump plate how long since then?

"A. I saw her four weeks ago here. She had it on.

"Q. After you left Boston, was there anything done to the port pump plate or cap or was it tampered with in any way?

"A. Not at all.

"Q. Was there any occasion to use it?

"A. There was no occasion to use it.

"By the COURT:

"I examined the starboard pump plate since the accident—that is, it wasn't taken off at all, but looked at; didn't unscrew it, but tapped around with a hammer to see if there was anything
95 loose about it. It wasn't loose; the condition was apparently good.

"Q. Take it during your watch from the night before up to nine o'clock, when you say you observed this plate gone, what was the condition of the water on the decks—how much had it come up on the deck?

"A. It would be almost impossible for me to describe to you how much water there was—anything like that—but I will say, in a very few words, that there was water continually, so that it was unsafe for a man to be there. He had to be up out of it on the top of the after cabin, after house, to be safe, or have hold of something. To travel around the deck or come on the main deck you would have to stand probably fifteen or twenty minutes and hold on around the mizzen-mast until you got a chance to run, and then make a run and get forward and get hold of something else for a few minutes. As the water came on deck it would come up on a man up to here before it would be level with the break of the poop or rail (pointing to his chest), coming on either side."

Cross-examined by Mr. Black:

I know of the captain's going ashore to make his protest, but I wasn't with him. I didn't sign the protest. There was no repairs made to the vessel in Savannah, with the exception of putting some new stuff over the hole we are speaking of. The mate and myself did that. The mate bossed it and I done the work. We had already nailed some lead over this hole after it was first found, and renailed it when we got a chance, probably two or three days afterwards. I was on board all the time while this vessel was being loaded at Weymouth. The first mate was there too.

"Q. What particular observation did you make of these
96 plates while the vessel was at Weymouth; any at all?

"A. Not just at that time.

"Q. When did you first pay any particular attention to the plates on the vessel previous to that voyage?

"A. While we were in Charleston the previous voyage. I have never seen the cap of these plates unscrewed. There was no need of it. Every time the water-ways were painted they were painted. When I got on deck that night the vessel was laying to, when I got on watch at four o'clock. My previous watch was from six to eight. She was lying to during that watch, and when I went below she continued lying to. I didn't go below till twenty-four hours afterwards. I was on the watch from six to eight in the afternoon. I went below at eight o'clock and remained below until four in the morning. When I came on deck at four o'clock the vessel was lying to, on the starboard tack. The wind was southwest or southwest by west. When I went below at eight o'clock the vessel was lying to, on the same tack. She had been on the same tack, as far as I know, all the time. She had a small trysail, a reef foresail, and forestaysail that night. At eight o'clock we kept her off. We didn't change her tack at all; just let her go free on the wind.

"Q. Still on the starboard tack?

"A. Her booms were on the starboard side, as she lay to. As she lay to on the starbard tack, the port side was lowest in the water. The captain was on deck at five first, then at half past six or thereabouts, then at seven bells—half past seven. He had gone down

below in the intervals between. He was on deck probably a quarter of an hour at a time. It is impossible for me to tell you
97 how long he was on deck each time he came up—more than a few minutes; probably one-quarter of an hour at a time. I didn't call the captain when I found I couldn't free her by pumping, because he was up every once in awhile; he would come up himself. I didn't call the other watch till seven bells.

"I had been in the vessel so long and never had much water to pump out of her before—anything like that. She was perfectly tight, and, of course, it didn't alarm me so very much because it was very heavy gale of wind, and I was thinking that probably where the chain box went adrift it drawed up some little iron rods that was down in the deck, and I kind of thought it would be natural for some water to soak down there where they come up and one thing and another. Fifty different ideas would come into a fellow's head at once. There may be a little here and there, but when you say that it was nothing very alarming. The covers of the chain lockers washed over several times. The first time was about six o'clock in the morning.

"Q. Were you at the pumps at the time they washed over?

"A. No, sir—that is, we were changing watches, changing the wheel. The man that was at the pump had to go to the wheel, and the man at the wheel was relieved and came to the pump, and during these times we had some few minutes in which we rested; probably ten minutes. I saw those covers when they washed off; picked them up myself. It was just getting daylight. I should say those covers were six feet long by three or two and a half. After I picked them up I put them back again on the boxes. They were not broken up. That vessel has a bulwark running from the break of the poop to the knightheads three feet high. Some of the bulwark was
98 carried away. The water-way was level where this plate was set in it, but raised some three inches above the deck. None of the stanchions were carried away; the stanchions were two and a half or three feet apart. The top of the plate was just about flush, so when it was painted over it would be about smooth. The cap was round, and when it was screwed down onto the plate, probably to take and lay a stick or straight-edge across the top of it from the brass—not the cap, the brass itself, the plate—it would be probably three-eighths of an inch higher than the plate. The edge of the cap came off a little tapering, little bevelling, but probably the very edge where it came down to the cap would be two-eighths; probably it bevelled an eighth of an inch from the middle down. I never made any particular observations; I never measured that cap to find out; it is just according to my ideas. Pieces of the bulwarks just forward of the break of the poop on the starboard side were carried away, right over where the scupper was through and forward of it; three different pieces, and some longer and some shorter—three widths of plank; the longest one I should think was seven feet. The mate and myself mended that, spiked them on; got other pieces that we didn't pick up, what went adrift. The pieces we picked up we spiked on, and what went adrift we got other plank

and sawed them out and hewed them out with an axe and put them on there. There was a small place of the bulwarks forward busted off from two stanchions; that hadn't gone adrift before we noticed it and put a spike into it and put it back into the place again. That was about ten or fifteen feet forward of this place I am speaking of, on the starboard side; the breaks were on the starboard
99 side, on the weather side. I have not seen the log of this voyage since I left the vessel. The log was kept by the mate. It is apt to be correct if a man has got time to write it.

"I couldn't say positively when the galley and forecastle doors were carried away; I could not fix the date. These pieces of the bulwark were broken off when we was water-logged, while we were getting the water out of her. We were water-logged the night before in my watch. I couldn't tell in the night what damage the sea was doing, but it was all done the next morning. The holes were through the bulwark the next morning when it was light enough to see.

"When she had this seven feet of water in her she was level with the water; right level all over with the exception of aft. There she was a little more out of water, but forward would come every little wash right over the knighthead; galley full of water, forecastle full, and water washed up into the cook-stove.

"Q. It was while she was so low as that you stood on the main deck and were pumping?

"A. We didn't stand on the main deck; we were standing on the fife rail around the mainmast and pumping, doing all we could to save our lives. We wasn't standing on deck. I might have said we were on the main deck. We was holding on to the fife rail, doing what we could. We wasn't making but very little progress. We was only doing it excited and doing it to save our lives in a peril like that.

"Q. Did any of your men stand on the deck pumping?

"A. Was there any standing on the main deck pumping? When they could do so—that was after ten o'clock; that was when she had this seven feet of water in her—they were standing there.
100 When she left Weymouth I wouldn't say she had four feet freeboard. I will say three and a half; between three and a half and four. I don't know what she drawed at that time."

Redirect by counsel for claimants.

By Mr. WILCOX:

The fife rail is three feet above the deck. We were standing on it. I remember we didn't paint the water-ways in Boston. We painted them the trip before that, down in Charleston or in Bull river, waiting for rocks. I had the supervision of that painting. We painted over this plate on both sides of the water-ways.

CHARLES G. PETERSON, examined as a witness for the claimants, testified:

I was cook on the Morrison and was in her on the voyage in question and for a year before. We never had any trouble with those plates or the pumps or water-ways; never been leaking or anything. She had been carrying general cargo and guano; had carried two cargoes for the Bradley Fertilizer Company before this one, and then fetched back rocks consigned to them. We never had any trouble on the voyage or did any damage to the cargo till then. Sometimes we had carried coal on the Morrison and sometimes general cargo; small and large cargoes both. I don't know exactly how much larger than this. My attention was not called to the amount of freeboard we had on leaving Boston. When we had been out a couple of days we got awful bad weather. As we left Boston we had fine weather, and the wind was pretty good one night. Next morning we got a head wind and had to go out
101 South channel; then we got a gale of wind right off; wind southwestward. I think they said it was. We were heeling over all the time; couldn't get into line, and it blowed heavy every day.

I didn't know anything about the pump plate until morning; about four o'clock I was called out to make a fire, and I found the galley door was out; had been carried away, of course; might have been washed out in the night, and the heavy sea rolling and coming over all the time. The day before it was on. It was split a little; been knocking around and carried forward. So after four o'clock I tried to make a fire, and got breakfast ready. After that it commenced to get so deep in the water—after breakfast—it got deeper in the water all the time, so it got so much water in the galley I couldn't keep a fire any longer; the fire went out. During this time I see the men were pumping all the time; every one working and pumping, trying to care for the water. Of course, I wasn't on deck all the time, you know, although I had to go from forward to aft about my business. During that time I had to climb over the rails to save me from going overboard; and then dinner you couldn't make. So after I saw I could not make no dinner I got myself out on deck and helped them pump, and worked on deck same as any one else. I got out on deck about ten o'clock. The second mate took a little hatchet that was handy and cut the boat lashings. My attention wasn't called to that plate at all. We all looked around the vessel to find the leak, and couldn't find it until about eleven o'clock; looked all around, inside and outside, but this couldn't be seen. It was full of water all the time, so heavy sea rolling over where the plate was all the time, and
102 filled the main deck where the plate was and where the scupper was. The water was never off there; always stood full. When we saw we couldn't free ourselves from sinking, the captain tried to let her go round, and during this time she took a heavy roll over—she was heeling over to port. We went to Savannah.

At Bull river, South Carolina, we took phosphate rock; had no

trouble with our cargo coming back. Afterwards we had cement one trip. I think it was to New Orleans. We took walnut back after this accident. I don't recollect exactly what cargo we had after that. I made three or four voyages in her carrying cargo after this voyage when the plate was washed away. I think we had one of coal and one of ice; never had any trouble after that time.

"Q. Did you have any trouble with the pumps or pump plates or scupper?

"A. No, sir; the scupper I don't know much about. All I hear is they found a hole in it, but the rest I saw."

Cross-examined by Mr. BLACK:

I didn't sign the protest.

This galley was located about amidships, on deck. The door opens that high from the deck (illustrating). You step over into it. There is a sliding door, not on a hinge. This ledge or coaming is not quite a foot high. Inside is a little higher, in the galley, because there is bricks on the floor, an inch or so higher. This sliding door goes over to port—slides over to port. It is a little on the port side. It opens right sideways; is in the after end; so you are looking not quite directly aft when you look out of the door. The
103 rail that it slides on is outside the galley, with nothing to hold it in position only them two string pieces. It could not slide back and out of its place. There is a little piece on the corner. A little batten would prevent that. If the door opened with a bang very likely it would knock that batten off.

"Q. You walked along the main deck when you went to the galley?

"A. Very seldom I could. I slept in the cabin. When I went from the cabin to the galley I went on the poop. I stepped on the fife rail around the mast and took a jump from the rail on the door step of the galley most of the time. The distance from that step of the galley to the fife rail was about three or four feet, or four or five—just enough to take a jump from there to the galley—and from the rail back to the poop was about two feet—enough for the pumps to go between.

"When I came into the galley I lit the fire that morning. The stove is not quite one foot above the level of the deck. I kept the fire burning till about ten; water put it out then. I got breakfast that morning; cooked it on the stove and served it in the cabin and in the forecastle both. I got it into the cabin by carrying it in a basket from the galley to the poop. I got to take a chance to do that; I did it by walking along the deck. I got breakfast ready about half past seven; cleared away the breakfast about eight and carried the baskets back again to the galley. I got the forecastle breakfast about the same time and served that right through the partition—a hole from the galley into the forecastle. The men took their breakfast in the forecastle-house."

104 Redirect by Mr. WILCOX:

I saw the men take their breakfast. I handed it in to the men from the galley into the forecastle. Whether they eat it or not I don't know.

"Q. You spoke of walking along the rail.

"A. That is between the galley and the poop; that is the most dangerous place. I got on the fife rail to get over to the poop because the sea was too heavy, and to keep from getting wet all over me, too.

BELCHER T. THURLOW, examined as a witness for the claimants, testified:

By Mr. WILCOX:

I have been a shipmaster for about twenty-five years. At present my business is ship chandler and grocer. I have been a vessel-owner; had them repaired and built frequently. I worked in a shipyard till I was twenty-five years old, off and on; to-day I am seventy. I know the schooner E. Morrison very well. I knew her first captain, Captain Rob't Lavender, and frequently went aboard of her; I have had dinner aboard. Stephen Lavender is master of her now, and we fit him out. He is always in our store, spends a great deal of time there, and I am often on board of her. I know her general construction and about the pump plate that has been spoken of and scupper. She is pretty wide and not a very deep vessel. I should consider her perfectly safe at two feet freeboard; two feet, I should say, would be a deep load for her with coal.

105 She has a poop extending about half the length of her to the mainmast.

I heard described how this pump plate was found torn out. In my opinion, that could not have been done by the working of the vessel. I only see one way to get the pump plate out of her a-sea or ashore, anywheres; that would be to strike it and knock it out. It can't be got hold of to pull it out, nor you could not get under the plate without you cut a hole in the wood. If anything struck the cap it would knock the plate out. I think if I went aboard to-day to get the plate out I should take something, if I wasn't allowed to take it out, and put again- the cap to knock it out. I see no other way. The plate lays fair with the water-way. The water-way is about six inches thick, laying about fourteen inches from the deck, between the two timbers; I should say it was about fourteen inches. The top of it would probably lay twelve or fourteen inches above the deck. I should say that her's does; I may be mistaken. She is a Portsmouth-built vessel; very thoroughly built. You understand there is a cant laying against the timbers before the water-way is put on it; that cant is probably a ten-inch piece of timber; eight or ten inch; ten, I should say. I never measured this water-way in which the pump was set to determine how far it was above the deck; I only judge from seeing the vessel and seeing other vessels. You take some schooners and they ain't over six or eight inches from the deck, and others are up a foot or fourteen inches. I

think a schooner like Lawrence & Foulks built for us—the Jennie Stout—hadn't over six inches above the deck.

"Q. I ask you in regard to this pump plate being set in the water-way, as you say you have seen it.

106 "A. I did not examine her in particular. I know where it must be set; no other place. There is nobody aboard but what has to see it every day; it is between two timbers. Knowing the Morrison as I do, I suppose it was properly set, because she is one of the best-built vessels in the United States, and is always considered so. She was built in Portsmouth, and that is the only place you can set a bilge pump."

Mr. BLACK: I object to the witness making any voluntary statements.

The COURT: He may describe the plate and he may give his opinion as to its setting.

My opinion is when a bilge pump is set amidship the end of it that takes the suction has to crook up to get to the bilge. The minute you begin to work it, and the vessel is old and filled with sand, you are better off without it; but there is no other place to put a pump but in the bilge. I have seen vessels with bilge pumps such as the Morrison has all my life. That is nothing at all unusual. I think I own in a vessel thirty-eight years old, built in Boston, that has a water-way and bilge pump just as she started with to-day. I never had any trouble in carrying cargo with her with the bilge pumps. They are scarcely ever used. They are only there to use to suck a vesssl out when they get on the beam end. I couldn't say how much dead-weight cargo the Morrison could carry. I never loaded her. Probably 850 tons ought to be a fair cargo for her.

"Q. You heard the mate describe yesterday the condition of the deck with the chain-locker covers, one being found aft by the poop, I think, and a galley door being washed about on the deck,

107 and the bulwarks on the starboard side washed in. If those pieces came in contact with this cap of the pump plate, what effect would they have?

"A. It would certainly knock it off, floating around in water at those times, in those hurricanes. If one of those pieces struck the cap it would knock it off. It would strike it sideways and knock the screws out and take the plate off. Sometimes the water-way is built of yellow, sometimes of soft pine, and sometimes of white oak. I have never known what would be the ordinary life of yellow pine in that place where it is painted and taken care of ordinarily. I have been repairing vessels this last — about eighteen years I have been ashore, and I have never found a covering board rotten in my life. That bark thirty-eight years old I spoke of has her first covering board as sound as ever. They are in a place where there is no chance to rot; well covered up and well painted. I don't think that a hole in the scupper could have been caused by the working of the ship. I was very much troubled in the Lucy Raymond once with leaking. If she were on one tack she would invariably leak, and on the other tack she would be tight. She was a bark and

pretty deep. Finally we found the leak in the scupper. It might have been broken with a crow-bar, clearing the scupper of mud. In this kind of weather good deal — things get into the scuppers, and it might have been eat off with a rat. That night a capstan bar might have stuck into it and something else struck the bar, and that would knock a hole into it. They are only about a quarter of an inch, more or less, thick, and if there were a capstan bar stuck into the scupper and something else come along and struck it, it would break the scupper, but a vessel don't work at all to break a scupper. The scupper gen-
108 erally commences on the upper part of the deck and runs through overboard out through the planking. I judge that it goes through the space between the timbers. This space is open underneath it. This scupper on the Morrison commences on the deck. That would be three inches above the beam, and three inches above the lower part of the timber it goes through, and as it goes through it comes out of the timber and goes in between two timbers and strikes the plank and goes out overboard. There is a piece put against the timbers before the covering board is put on, bevelled off—I think it is called a cant—and the covering board lays on that. The bottom part of the scupper is supposed to be even with the top of the deck, so as to drain the water off. If a handspike dug a hole in the scupper the next sea might wash it out, and the next sea it would go over the rail or anywhere. The handspike wouldn't jamb there unless it was pretty well through. If a handspike went in the scupper it would float and strike the lower part first. It would go in on the angle of the scupper pipe, and the water would keep the handspike up, and the end would go down and strike the lower part of the pipe. I don't think it would wedge itself in there. If it was big enough and you carried it long enough it would go through. It would have to be in far enough to make a lever of it—that is, where the hole was. If a handspike went in there it would depend upon circumstances how large a hole I would expect. It would depend upon how far it was struck. I wouldn't expect the scupper would be ripped open and not punched through, because it is all solid wood where it goes in. It is solid wood
109 probably for eight inches, and then it comes through between two timbers, and there it isn't; it starts three inches above the bottom of the wood and goes on an angle through and comes out of the wood. The lower part of this timber lays with the bottom of the deck. If it went in, I should expect to find a hole right where this was; there is nothing behind the lead to support it, to prevent its making a hole there; it would break a hole and the bar would go out and go away. It might break the lead in and then wash away overboard, probably. I have had no experience in holes being pierced by pushing things through the pipe in attempting to clear the scupper when it was jammed; I have found a hole made, but how it was made I didn't know; I presume it might be made with a crowbar or handspike in getting stuff out which generally gets into the scupper quite often. Her tonnage was about five hundred tons; I do

not know her exact register. I don't know whether her ceiling had air streaks; I never examined it. Some vessels has them and some don't; it is better to have them. When they don't have them they don't always have holes between the timbers to ventilate.

Cross-examined by Mr. BLACK:

"Q. Did you notice these bilge plates when you went on board the vessel?

"A. No, sir; I couldn't say whether they were painted over or not.

"Q. Did you ever know of a bilge plate being knocked out by something striking it?

"A. Have never known them lost out any way. I never knew of a bilge plate being knocked out by something striking it; they are set in so that the frame or square part is countersunk into the wood—level with the wood, set down in—and the round part
110 is also set into the wood and forms a shoulder, and is fitted in pretty tight; it ought to be, at any rate.

"Q. Before you could knock that out, you would have to break away the wood from the place where it was set in and the bearing on the round part of it, of the water-way, would you not?

"A. Not at all. When you strike the cap it would turn out one edge and the whole would go; strike the cap and those two screws next the cap would go out.

"Q. Did you ever take one out?

"A. No, sir; I never had occasion to. I ain't in that business at all. Yellow pine is pretty hard wood, if it is sound.

"Q. In order to strike that cap and get one end of the plate raised up you have to imbed the other end into the wood?

"A. I don't think so. If you strike it and knock the edge out next to the blow, it would go out. I can't conceive any other way.

"Q. You must hit it on top, mustn't you?

"A. I think not.

"Q. Do you mean to say that an object floating on the water—on a horizontal plane—on the same plane that the cap was, could strike that little edge and raise a portion of the cap in such a manner as to raise one edge of the plate?

"A. I think so.

"Q. Did you ever see it done?

"A. No, sir.

"Q. It is a mere surmise of yours?

"A. I am only giving you my judgment.

"Q. If you were going to take out such a plate, wouldn't you put a chisel under it and pry it out?

"A. Then you would have to cut the wood. I should take out the cap.

"Q. Wouldn't you have to take it out with a chisel of some
111 kind?

"A. You would have to spoil the wood, then; you couldn't get it out any other way. If that wood was soft or the screws didn't hold, that plate would come out a good deal easier.

"Q. If the screws held in the wood, wouldn't you expect the heads of the screws to break off before they pulled out, if the wood were sound?

"A. No, sir; I can take a claw and take out any screw without taking the screw out.

"Q. Did you ever do it with brass screws?

"A. I think you would find a dozen come out where you would find one break off.

"Q. You have never done it?

"A. I think I have.

"Q. With brass screws?

"A. I think so; I am under that impression, and I think I can do it, too.

"Redirect by Mr. WILCOX:

"Q. (Handing witness sample plate with cap.) Is that about the usual kind of pump plate and cap?

"A. I should suppose she would have a cap a little bigger than this, and the screw would be bigger. That is about the height of the cap, but those are generally finished more than this is.

"Q. And the larger the plate the thicker the cap?

"A. The thicker the cap. They all increase in proportion as they get larger. I was looking at a cap this morning a quarter of an inch above the plate, but that was a very large cap."

Claimants' counsel asks that the plate shown to the witness be marked for identification.

Eighteen inches of water for such a vessel would be a little too much in moderate weather. This vessel has got a floor
112 timber fourteen inches thick—about fourteen. It was said here six, but I have never seen one less than about fourteen. I measured a vessel last week of her size, which had fifteen inches floor timber. She would have about four inches skin. Now, you pump a vessel in that kind of weather this vessel had, and you pump until you get a rolling suck or some other, and you hav-n't taken your water from the timbers, and you don't care two cents about it; you know you had a suck on the vessel. The water is then six or eight inches from the cargo, and you may have something else to attend to. You wait a little while until you get another, a second or so, and you give way and your timber is entirely full of water. If you should sound them you *you* might find three inches, & you leave ten minutes and you will find fourteen that has soaked out, especially where a vessel is twelve years old and gets a dirty skin, & therefore we have to dunnage our cargo to prevent that very thing. You can see how it would be. The water is going all over a vessel's hold, and you can't sound and tell how much water there is in her—eighteen inches. The rod will give the highest depth that the water comes up, and the next thing it might be down to six inches, because it has rolled somewhere else. I have been down there to secure cargo, where we have had to restanchion, and have found it so on the bottom.

"Q. If you actually had seven foot of water and put your rod down?

"A. You can't exactly tell whether you have fourteen inches of water or eight.

"Q. But if she had seven feet in and you put the rod in?

"A. I think you could tell then, because that would carry the vessel nearly level with the water. There would be the same swash, and it would go all over the vessel entirely.

113 "Q. And it might show higher on the rod?

"A. It will always, because the rod takes the highest pitch of the rail of the vessel. It is like the sea coming on the shore—the sand is wet way above the level of the sea.

"Recross by Mr. BLACK:

"Q. When did you first see the plate exhibited you by claimants' counsel?

"A. Here, to-day.

"Q. Look at that cap and say if it has not come away from the founders with only the thread cut on it and not finished in any other respect.

"A. I am not a mechanic. I said they were usually finished more than that."

Mr. BLACK: If this plate was brought here as a sample I want it to appear that it is unfinished.

The COURT: It is not offered in evidence, and neither was yours. They are simply for illustration.

The WITNESS: The two fastenings exhibited here are two extremes. That one is not finished, and the one shown yesterday was extremely thin; I never saw one so thin.

JAMES E. BRETT, examined as a witness for the claimants, testifies:

By Mr. WILCOX:

I am in the shipping and commission business and have been for thirty-six years. I have owned in 250 vessels and rebuilt, repaired, recaulked, and recoppered them. I have chartered and loaded and bought and sold them. I know the schooner Edwin I. Morrison; I am part owner of her; have known her ever since she was built. I know about this pump plate and cap that have been described here.

I always supposed she was properly constructed in that re-
114 spect. I have owned over fifty vessels that have had that same kind of bilge pumps in them—in the water-ways—and used in the same way.

"Q. You have heard it described how that pump plate was found pulled out, the screws with it, and gone. Could that have been done by the working of the vessel?

"A. I think not.

"Q. How do you account for it?

"A. I don't know. I don't know of anything except something striking it.

"Q. You have heard of the covers of the chain lockers and galley door and pieces of the bulwarks, &c., being broken or torn away, and of one of the covers of the chain locker being found as far back as the poop, and you have heard described the water that came over the deck. Taking those things into consideration, are you able to account for anything hitting this cap or plate and loosening it or breaking it off?

"A. I should think any heavy article hitting that cap would knock the whole plate right off, such as a fender.

"Q. Hitting it in what way—by a perpindicular blow or horizontal?

"A. By a sliding blow.

"Q. Take, for instance, the cover of the chain locker, could that by striking it laterally knock it off?

"A. If it hit it a fair blow it would knock it right off; yes, sir. This vessel is now running for me. I am the agent of the vessel. She has carried a dozen cargoes since that accident that I know of.

"Q. Do you know of the carrying of a larger cargo than she had on at that time?

"A. I know that she carried 850 tons of coal from here to Boston in the month of November, 1882. I know she has just car-
115 ried a cargo of this same stuff from here to Savannah; that she was out in that heavy gale of a few days ago, and has arrived at Savannah all safe. I have got a letter from the captain in my pocket.

"Q. How much cargo?

"A. The same cargo. I don't know how many tons she had in this time; a full cargo; all she could carry. I know she has one of those plates on her now, just the same as ever. I should say, for an ordinary cargo in an ordinary voyage, three feet would be sufficient free-board for that schooner. I have sailed in that vessel as a passenger but not as a navigator. I have never loaded vessels personally as a stevedore.

"Cross-examination by Mr. BLACK:

"Q. Do you know that it is a different made in which they load vessels, as to the depth to which they load in summer and in winter?

"A. Oh, yes, sir. I shouldn't load a vessel within fifty tons as deep in winter time as I would in summer time.

"Q. Fifty tons would mean how many inches more of freeboard on a vessel of that size?

"A. That would depend a great deal on the vessel.

"Q. Please answer my question. Take that vessel, if you know anything about her? Do you know?

"A. No; I could not tell you exactly.

"Q. Do you know whether the last fifty tons put on a vessel immerses her more in proportion than the other cargo that is put on?

"A. It does in most vessels. It puts her deeper down in proportion.

"Q. Isn't there some estimate or rule within your knowledge as merchant which calls for a certain number of inches of free-
116 board, having reference to the number of feet depth of hold the vessel is?

"A. There is such a rule, but I have never been governed by it.

"Q. What is the rule?

"A. I don't know exactly. I have never been governed by it except in grain. There is a difference in respect to the depth to which I would load a vessel, as to the kind of cargo. Some cargoes you don't put as much in as other kinds. Phosphate is not any heavier—a ton of it doesn't weigh any more than a ton of anything else—but for the purpose of loading it is regarded as harder cargo than others; it is one of the hardest cargoes.

"This manufactured phosphate is not harder than coal. This cargo was guano—a manufactured article, which is a mixture of everything. I have seen this vessel loaded in November with coal bound to Boston. I was not on board of her at the time. I knew of my own personal knowledge how much cargo she had on, because I charged commission on it and signed the bills of lading for it and got paid the freight on it. I stated in my judgment one of these caps could be knocked out by something striking it. I have never seen one knocked out. I have seen this cap on the Morrison often. I have never known one to be knocked out. My attention was never particularly called to the cap on the Morrison. I don't know how much above the level of the plate the cap rose, only by seeing it. I never measured how much above the level of the plate the cap rose. It was painted when I saw it. There might have been a good many coats of paint had been put on it. The vessel had been painted a great many times. I have been the agent of this vessel ever since she was built. I own, I think, an eighth.

"By the COURT:

117 "Q. You said you were part owner and had looked after this vessel for some time?

"A. Yes, sir.

"Q. Do you know whether since this accident she has been repaired along her water-ways where this plate was?

"A. Nothing that I know of. This place where the plate was knocked off was just covered up with lead and the other place was left in as it was. This water-way where this plate was has not been repaired at all or the timbers changed in any way. It is just the same as it always was."

By Mr. BLACK: I will read this report of the Morrison in the record to you and ask you whether it is accurate as far as you know: "Schooner E. I. Morrison, 137 feet 8 inches long; 32 feet 4 inches wide; 16 feet deep; 508 tons, double deck; built 1873, at Portsmouth." Is that correct?

A. I think so; but 508 tons is the new tonnage with all the houses taken off. She is 537 tons register. That is the tonnage that had prevailed since 1884, under the new law, but at the time she carried this cargo she was 537 tons.

BELCHER T. THURLOW, recalled for further cross-examination.

By Mr. BLACK:

"Q. When you speak of the freeboard of the vessel, from what point to what point did you measure to take the freeboard?

"A. I only told you I thought she would be entirely safe with two feet freeboard. She has got a small main deck and is a wide vessel.

118 "Q. Can't you answer my question?

"A. I can't answer it any other way.

"Q. When you speak of the freeboard of the vessel, from what point to what point did you measure to take the freeboard?

"A. I mean from the top of the deck to the water.

"Q. At what part of the deck, the centre or side?

"A. At the side; there is very little difference.

"Q. You take it from the top of this water-way you have spoken of?

"A. No, sir; I take it from the top of the deck, the level of the deck. The difference between the centre and side of that vessel is not over an inch.

"By Mr. WILCOX:

"Q. Do you know the depth of her keel?

"A. The keel and shoe ought to be something about three feet."

ELIZUR H. ATWOOD, recalled for the claimants, testifies:

By Mr. WILCOX:

"Q. Do you know of this schooner carrying heavier cargoes than she had on at this time?

"A. Almost invariably we put in more cargo.

"Q. And how much more?

"A. 850 tons, I think, is the largest cargo. Say with coal, never less than 800, and so on, forty and thirty and fifty, as the case may be, when they are loading. Never less than 800 tons.

"Q. How many coal cargoes of 800 tons do you know of her carrying?

"A. She has carried coal in summer time and in winters ever since she has been built, very nearly. She was in the cotton

119 trade first along, and went over to Europe. She has generally carried coal for the last four or five years; never less than eight hundred tons.

"Q. In winter?

"A. In winter.

"Q. You desire to make some statement about the keel in addition to what you said yesterday?

"A. In adding up and making thirty-five inches we didn't say anything about the ceiling, which is about four inches. I said the keel was sixteen and the garboard seven and the timbers from twelve to fourteen, I couldn't say positively, and then the ceiling is from three and a half to four inches.

"Q. Has the vessel since this accident to her pump plate been repaired at that point in any way except to put the canvas and lead on?

"A. Nothing more than caulked. We have caulked her some and I always caulk them once in four years; nothing new about her. Her starboard-pump plate is in her now; never has been started. Since then she has been to New Orleans with a cargo of timber. She has been in the coal trade during the summer, and she is on the second voyage this winter in the same business.

"By the COURT:

"Q. She has been running all the time?

"A. She has been running all the time and never has been repaired excepting caulking She is perfectly sound. I have no insurance on my interest and never have had. I keep the vessel in perfect order. She is perfectly seaworthy in every respect. She was painted on the water-ways and in the vicinity of this pump cap and the scupper most likely twice a year. The time of year depends altogether upon the mate and the master—whenever it gets worn off.

120 "Q. You have heard described the hole in this scupper and you have been a shipmaster, haven't you?

"A. Yes, sir.

"Q. State, from your experience as a shipmaster, what different causes might have brought about such a hole in that scupper.

"A. There are various causes. Things floating about the deck might go in, and anything striking against it might crack the scupper and let the water in, and it might be punched through. You can't tell. Sometimes the scuppers get stopped up with anything and we shove the dirt out. In a gale of wind there is a great deal of stuff floating about, and it goes very swift when she is pitching. The sea, surging fore and aft, you see, carries everything with it. I have heard of such a thing as lead pipes being eaten by rats on a vessel. I have never experienced it. I think the first mate has sailed. I hoped to get his attendance here. I telegraphed him before he sailed, but he had gone before the telegram reached him."

Cross-examined by Mr. BLACK:

There were air streaks in this vessel, in the ceiling.

CHARLES G. PETERSON recalled for claimants.

By Mr. WILCOX:

We had a cat on board that vessel; a little kitten, too.

By Mr. BLACK:

I know there are rats on board, because I have found the cat get some now and then.

"Q. Knowing the rats were on board, did you go to look around the lead pipes to see whether the rats had been eating them?

"A. No, sir."

121 WILLIAM A. CAHOON recalled for claimants:

By Mr. WILCOX:

"Q. Did you see the sounding rod when the water was measured about the bottom?

"A. When the most water was in her; yes, sir. When we measured the water in her there was nothing less than seven feet or more."

By Mr. BLACK:

The measuring rod was four feet or five—an iron rod. It come up over the rod three feet onto the line. I can't say how much more it was than seven feet; it would be impossible. I want to explain why it wasn't measured that present time.

By the COURT:

"Q. Why not?

"A. Here we was working for our lives, and the captain himself didn't want to discourage his men or us. I was standing pretty close to him when he hauled that rod up out of the pump there, and he shook his head and waved his hand for nobody to say anything to the men that was to work, how much water there was in the vessel, because it would excite them so they wouldn't be fit for labor. That was about half past ten or eleven, somewhere along there.

"Q. Did you see it measured about eight?

"A. No, sir; I didn't. I see it measured at five in the morning."

By Mr. WILCOX:

I did not look at my clock to fix the time. There was no time to look at clocks or anything else in a time like that. The soundings were taken in the pump on the poop.

By Mr. BLACK:

122 "Q. Did the vessel get any deeper in water than the seven feet when you found soundings? Did she continue leaking after soundings were taken?

"A. We had the hole shut up then; the seven feet were taken after the hole was shut up. That is the time I seen him sound—10 or 15 minutes after.

"By Mr. BLACK:

"Q. How deep in the water was she then?

"A. That would be impossible for me to tell, but the vessel was water-logged; she was just ready to go down—to leave the surface of the water and go down—and in fifteen minutes more she would have gone down if we hadn't found that plate. The way that vessel was leaking and taking water in that hold, she would have gone down with us."

By Mr. BLACK:

I don't remember getting my breakfast that morning, only going into the cabin and catching up a mug of coffee and eating a piece of bread between half past seven and eight o'clock.

By Mr. WILCOX:

The other men got their breakfast in the same way. The first watch that was below, of course, got their breakfast. We was called at seven bells—that is, half past seven—and the first watch below got their breakfast, eating it in a great hurry. I didn't see any sounding of the water in the hold after the sounding that I mentioned yesterday, of eighteen inches, and this sounding I have just spoken of after the hole was covered. I know the pumps were sounded. I heard of sounding afterwards, but not at the present time, not during that time.

123 "Q. Before the seven feet of water you have spoken of and the other eighteen inches you have spoken of, did you hear any report of any sounding?

"A. No, sir; not at that time."

Claimants rest.

HERBERT LAWRENCE recalled for libellants.

By Mr. BLACK:

"Q. Can you from your experience state whether one of these bilge pump plates—whether it was three inches or five inches square—which was properly secured in sound wood could be knocked out by anything striking the cap, which is described as being a quarter of an inch above the level of the plate, with a bevelled edge?

"A. I think it would be impossible to knock it out, with a piece of wood at least. With an iron bar you might hit a hard blow and knock it out; pretty hard at that, too.

"Q. Bearing as it did on the wood of the water-way—I mean set in so it was all flush with it—what effect would that setting in, or putting in, so it was all flush with the water-way and the edges of the cap bearing against the wood, have as to resisting the blow?

"A. You would have to mash the whole wood on the outboard side if you struck it on the end like that.

"—. Does a bevelled edge present any surface of resistance for a piece of wood to strike against?

"A. No, sir."

Cross-examined by Mr. WILCOX:

Q. Supposing that there was a straight or vertical edge,
124 and no other bevel, of a quarter of an inch down to the surface of the pump plate, and that a body weighing 100 pounds struck on its sharp edge horizontally the edge of the cap?

A. The cap supposed to be round on top?

Q. This body weighing one hundred pounds would come propelled by all the force of a wave of the sea passing over the vessel. Do you think that that would not disturb the pump plate in any way?

A. No, sir; I don't think it would disturb it at all.

Q. Wouldn't it loosen it in any way?

A. I didn't say that. If you will let me explain to you—I want to explain.

Q. Do you think it would tend to loosen the pump plate?

A. It might loosen it a little bit.

Q. Supposing that was followed shortly after by another blow; would that?

A. If you keep repeating you may knock it out after awhile; if you keep repeating, of course, and keep repeating.

Q. So there would be nothing, if that would be the case, surprising in finding this whole plate torn out of its socket, with the screws?

A. Screws and all out? Not if the wood is unsound.

Q. If it struck often enough?

A. I don't care how often you strike, the screws would stay there if put properly in the wood.

Q. Have you ever tried it?

A. Several times. The screw-heads would break.

Q. Have you ever tried getting a pump plate out?

A. I never saw a pump plate. I have tried the same thing on vessels. We don't have them here in this country.

125 Redirect by Mr. BLACK:

Q. What have you seen here?

A. A ventilator very much like that, probably half an inch higher.

Q. The whole distinction being——

A. That being flush and the ventilator is raised above the plate to give ventilation. The plate of the ventilator is very much like the plate of the bilge pump; the only difference is in the cap. We screw this up and down to let air out alongside, and the cap of the ventilator is fastened so it can't come out. I have put in such ventilators inside and outside of vessels, both—thousands of them—and fastened — with screws, and they are there to-day; have been there 25 years.

Q. If anything that was floating on the water struck the edge of that plate and the plate was set within three inches of the bulwarks, wouldn't you expect to find the bulwarks knocked out, too?

A. If it misses the plate, something must go out. I would expect to find some mark of something striking the bulwarks. If the bulwark was intact it would be evidence that nothing struck it at all.

By Mr. WILCOX:

The ventilators that I put there were there for all time. I never took one off in my life.

THOMAS H. MORTON, called for libellant, testified:

By Mr. BLACK:

I have seen those ventilator plates in vessels and bilge pump plates. I never saw ventilator plates on top of a covering board or plank sheer. I have always seen them on deck, out by the
126 water-way. Covering board and plank sheer are two different names for the same thing, but the water-way is different. That is above the deck or flush with the deck—a heavy piece of timber—while the covering board is over the frames and covers the water-way, too—covers the whole top of the side of the vessel. Bilge plates set in the covering board would be under the rail. If they were close to the bulwarks it would be on the covering board.

Q. What is your opinion as to whether an object floating on the water on deck could strike one of these bilge-pump caps which project above the plate anywhere from an eighth of an inch to three-eighths of an inch, with or without a bevelled edge, in such force as to drive that cap out?

A. I can't conceive that in a body of water anything could hit it, without it was a piece of iron. A piece of wood wouldn't do it. It would be on top, as a matter of course.

Q. And if it were on the lee side of the vessel, what would be the condition of the wood floating, as to being near the deck or not?

A. It would be way above the deck, according to the body of water on deck.

Q. How would it be in respect to the bulwarks giving way if anything were floating around, hammering around on the plate?

A. It is a very common thing for a lee bulwark to give way, where there is much water on deck. The pressure of the water will do it. Bulwarks are nailed on the outside of the stanchions.

Q. Did you ever know of the rats eating into the scupper pipe, in your experience?

A. That is a part of seamanship I never heard of.

Q. You never heard of such a thing, did you?

A. Never heard of it—no; particularly in a gale of wind
127 I can't conceive what rats should be doing on deck.

Q. If a scupper pipe was found with a hole in the middle of the length of the pipe, on the under side of it, what would your judgment be as to whether that hole could be caused by things floating on the deck and getting into that scupper pipe?

A. Anything that entered the scupper pipe, without it got wedged, would go out of it. I can't conceive how it would make a hole in the middle of it.

Cross-examined by Mr. WILCOX:

Q. Suppose this cap extends up with a vertical edge a quarter of an inch above the surface of the plate, the plate being flush with the covering board, as you call it, and suppose that a wooden cover, like a cover to a chain locker, weighing one hundred pounds, should strike the vertical edge of that cap—forced against it by a strong

wave sweeping over the vessel in a gale—do you think it would have any effect on the pump plate or disturb it in the least?

A. No, sir; not without the wood was rotten. I can't conceive of anything hitting without it was a big body of water, as a matter of course, going over it—particularly a door.

Q. You don't apprehend my question. I assume that the edge of this chain locker struck the vertical edge of the plate, so that it brought up on that vertical edge for a time. Would it disturb the plate, in your judgment?

A. No, sir; it would not.

Q. Not in the least?

A. No; not with an inch-and-a-half or two-inch screws in, and with good wood.

Q. It wouldn't tend to loosen it?

A. No.

128 Q. Suppose you struck it with an ordinary-sized hammer, the vertical edge of the cap, wouldn't it tend to loosen the plate, in your judgment?

A. If it were a pretty heavy blow, it might possibly.

Q. So that if the cover of a chain locker hit it a pretty heavy blow it might loosen it. Don't you think so?

A. No; I do not; because it is wood, and wood must have buoyancy, and I can't conceive how wood would hit it.

Q. But if it did hit it?

A. If it did hit it, I answer, "No."

Q. Would it make any difference whether it was hit with a hammer or with the cover of a chain locker of the weight of the hammer, provided they both struck in the same place and with the same force?

A. I think it would make a great deal of difference. An iron hammer would strike heavier than a piece of wood, of course. I never saw a pump plate taken out. I do not recall anything similarly constructed of metal, set in wood, ever being disturbed in any way by a blow.

So much of the log book of the schooner Edwin I. Morrison which was offered in evidence by the libellant and as is deemed material by either party is attached.

The erasures and interlineations which are mentioned in the evidence appear on the face of said log.

Both sides then rested.

129 After the interlocutory decree and order of reference to compute the damages herein was entered a commission was issued by the court, on libellant's application, to examine witnesses at Savannah for the purpose of proving the amount of said damages, which order, made July 13th, 1886, provided, among other things, that claimants' representatives be at liberty to propound questions in addition to the cross-interrogatories to be served herein on ten days' prior notice of intention to do so, and if so further examined the libellant to have a similar privelege.

On the hearing before the commissioner the claimants' counsel

offered (the libellant's counsel objecting and excepting) from the deposition of Thomas H. Laird the answer to the first question on additional cross-examination, and also the answer to the first question on redirect examination found below.

Testimony under Commission to Savannah, Ga.

My name is Thomas H. Laird; age, fifty-nine; residence, Savannah; occupation, port warden of the port of Savannah. My occupation in January, 1884, was one of the board of port wardens of Savannah, at Savannah.

At the request of the master of the Edwin I. Morrison, on January 28, 1884, Mr. John Powers and myself went on board said vessel, and there found that the hatches were properly secured. We had the hatches taken off and inspected the cargo, and found all the cargo in sight damaged by being wet by salt water. The cargo consisted of fertilizers in bulk and in sacks. We considered 4,500 sacks as badly damaged—some slacked, some almost out, and others badly stained, and when moved the water would run out of them.

130 In regard to the bulk, there was a great deal of it wet; there may have been forty or sixty tons wet; our estimate was merely guess-work. I don't know whether there was any nitrate of soda delivered from said vessel; I don't remember seeing any empty bags. I don't know what became of the cargo after it was discharged on the Central R. R. wharf. I know nothing further to the advantage of the libellants.

Cross-interrogatories Administered to Thomas H. Laird, a Witness on Part of Libellant.

I have been port warden about ten years. I have examined several hundred vessels loaded with guano or fertilizers prior to the Morrison; I can't remember the names. I was prior to being a port warden a master of a steamboat, and sailing boats also, and also for four years harbor master of Savannah. I have been connected with shipping nearly all my life. I remember I made the examination of the E. I. Morrison, but do not remember the details without referring to my records. Sometimes we were on her twice a day. There was no cargo discharged when we made the first examination. We would examine a part then that would be discharged, and then we would examine another part and that would be discharged, and so continued until the whole cargo was discharged. All the examinations were made of each particular part of the cargo before that part was discharged. I always went below deck. I remained below fifteen or twenty minutes at a time. I have examined before this several cargoes of the same general kind—damaged cargoes of fertilizers. I had before that examined fifty or sixty cargoes of fertilizers damaged in whole or in part; some damaged to the extent of one-fourth the cargo; some a few tons, and some less.

131 The kind of damage I found in this case was damage by sea water. The captain of the vessel was present all the times, and I think Mr. Lawrence Kelly, the stevedore, and sometimes Mr. Powers; and there may have been others at the examination; I don't remember. I did nothing more than look at the cargo while it was being handled, being taken out of the vessel. I examined all the bags and found 4,500 damaged, as before stated. There were forty or sixty tons, as near as I could estimate, of the bulk guano damaged. The bags were stained; the color of the stain was a dark brown. There were not many of them stained; the balance were wet, saturated. The stains were all over the sacks except at the four corners. I counted the sacked fertilizers which were damaged, amounting to 4,500 in number. I only estimated the amount of damages — bulk fertilizer; I can't tell exactly what the proportion was. As to the bulk, the difference was that one portion was wet and the other dry. The wet we called damaged; and as to the sacked it was the same way. I did examine cargo in the hold of the vessel, and the part which I stated was damaged was stowed, a part in the between-decks and a part in the lower hold. The Morrison was double-decked. The damage was in both wings and bilges and in the between-decks amidships, and a great deal of it around the mainmast between decks. I remember in part, and in part I refresh my recollection from my memorandum made at the time, which is entered upon my record of survey. I did not open any of the bags. I have referred to the record of the survey dated January 28, 1884, which record is made by the clerk of the board of
132 port wardens from memorandum furnished the said clerk by Mr. Powers and myself. The clerk wrote the record from said memorandum, and then we signed the same.

I know nothing further that will benefit the claimant-.

On the trial in the circuit court libellant objected to the foregoing question on the grounds above stated and as incompetent. The court overruled the objection and libellant excepted.

All the indications which I saw on the vessel were a torn mast coat, which is a canvas coat around the mast, and the water-way seams were open, which was a sign of straining, and there is no doubt in the world that the greater part of the water went down through that torn mast coat and said water way seams on deck, in my opinion. This was a three-masted schooner. Bulk cargo of guano is hard cargo on a vessel, and in a heavy seaway is likely to strain a vessel. From general appearance, the schooner was a staunch vessel. She has delivered several cargoes here since, in good condition. I have inspected cargoes on her twice since.

Redirect:

The bilge-pump pipe is generally a great deal smaller than the main-pump pipes. Nevertheless a great deal of water would get down there, but I think the two main pumps would discharge more water than could get down through the bilge-pump pipe. I am of the opinion that the two pumps would keep her free unless there

was a leak somewhere else than through the bilge-pump pipe. I know nothing of the actual facts of this voyage. I have simply given my opinion as asked.

The same interrogatories and cross-interrogatories having been administered to JOHN POWER, the answers were as follows:

133 My age is about thirty-seven; residence, Savannah, Ga.; my occupation is port warden of Savannah.

I examine- the schooner Edwin I. Morrison on her arrival in Savannah January 28, 1884. The cargo consisted of guano. Some was wet and some was dry. We have got on our port-warden survey, made January 28, 1884, 4,500 sacks wet. We have not got the amount of the bulk wet on our report. Some of it was wet. I know nothing about the nitrate of soda. We called it guano. I would not know nitrate of soda if I saw it. I think there was about 4,500 sacks in all, but I can't remember about the bulk. I can't remember anything about empty bags. I last saw the cargo in the hold of the vessel while it was being taken out of the vessel. I never examined it on the wharf. I don't know what was done with it; know nothing further to the advantage of the libellants herein. I have been a port warden about five years. I had examined probably several hundred vessels having cargoes of guano before the Morrison. I can't tell exactly how many. Previous to being a port warden I had been a policeman at Savannah for ten years. I have sort of a faint recollection of the examination independent of my records. To the best of my recollection, she was lying astern of the Boston ship at the Central R. R. Co. wharf. The examination was made January 28, 1884, according to my record, and at other times. I can't be positive as to who were present at the examination or how long we were present, it has been such a long time ago. I think Mr. Laird was there. I am satisfied in my own mind he was there. When we made the first examination none of the cargo was discharged.

134 How much was discharged when we made the other examination I don't remember. I went below deck. I remained there ten or fifteen or twenty minutes at each examination. I don't know whether I have examined one as badly damaged, but I have examined damaged cargoes of the same kind; I can't remember how many vessels; it would be guess-work for me to say. The kind of cargoes were guano, ranging from 350 to 550 tons or over to the cargo. The kind of damage was being wet by sea water, and I can't remember the amount of damage. This cargo was wet by sea water; I state this on my own knowledge. I determined its condition by looking at it. I determined its condition in the vessel and no other place. I can't remember who were present. I did not do anything but look at it. We examined the whole cargo—all we could see when we went there. Some of the bags were stained; the stains were wet and muddy and looked brown. I do not remember about the bulk. The difference between the damaged and the undamaged was that one was wet and one was dry. I can't remember where the damaged was stowed, but, to the best of my recollection, it was "'midships." I can't say the extent of the damage; I don't

know the value of it. There was, as I said, 4,500 sacks wet. I don't remember having opened any of the bags. I don't remember that I saw any empty bags at all. I have refreshed my memory by referring to the record of a survey made on January 28, 1884, by me. The record was made by the clerk of the port wardens under my direction. The record was signed by Mr. Laird and myself. I know nothing else of value to claimants; I have stated all I know about the matter.

135 *Deposition of George M. Cook, Taken on Behalf of Claimants December 1st, 1887.*

By Mr. ADAMS, for claimants:

I live in Provincetown, Mass. My age is thirty-one. I am a mariner and have been such about ten years. I have been mate of a vessel about seven years. I have known the schooner E. I. Morrison ever since she was built; was mate on her in 1884.

I remember a voyage I made on her from Weymouth to Savannah in the early part of 1884. I have a particular recollection, to a certain extent. I have a more distinct recollection than of other voyages I have made, because we encountered very severe gales during the whole passage. The vessel was loaded with guano that voyage, some of it stowed in the lower hold and some of it between decks. The Bradley Fertilizer Company loaded the vessel. I was present while she was being loaded. I recollect the incidents of the voyage without referring to the log.

Q. I wish you would just state what your recollection is of the marked incidents of the voyage.

A. I remember that we sailed from Boston, I think, the 4th day of January; that we went in on the shoals and anchored next day; that we got under weigh from there & ran out South channel; that we encountered a heavy gale of wind on Monday night; that the vessel labored heavily and the seas were constantly breaking over her from all parts; that after that it moderated to some extent, so that we made sail; that on Wednesday the wind breezed up again from, I think, the westward; that the vessel made considerable water, and on a Thursday morning some time we went to the pumps and found that we couldn't free her; that we sounded the pumps, and I think that time found about 18 inches of water in her.

136 We kept on pumping and got no suck on it; sounded again and found about seven feet in the well. I couldn't tell how hard the wind was blowing in miles. The weather was very bad. It was a very strong gale; as bad a one as I ever saw. It had been blowing since Wednesday; breezed up Wednesday the second time and kept continually blowing. This was one of the strongest gales I know of.

"Q. Do you mean that it covers all that period?

"A. Yes, sir; from about noon Wednesday. It had the effect of straining the vessel to a considerable extent. It washed the forecastle door off, broke up one of the chain lockers considerably, and

washed everything movable about decks. On Thursday we didn't get any meals. I was on watch from twelve to four Wednesday night, and the next morning I came on watch at eight o'clock. I went below at four and remained till eight."

Before I found this seven feet of water by sounding there were some floating things around—some things loose around deck; there were parts of a chain locker, forecastle door, and a spar; a gaff that we had on deck got loose; was found loose in the morning. These things were floating around the deck in the waist of the vessel, on both sides. The gaff was lashed on the port side; the gaff was on the port side. It couldn't get across the deck any way. It was a spar about thirty-eight or forty feet long; it was ten inches at the biggest part in diameter, and had been lashed in the port waist on the main deck. I don't know when that got loose. I first observed it Thursday morning.

137 A little while after finding the seven feet of water the captain ordered the man at the wheel to throw his wheel up and jibe the ship. We had been on the starboard tack when that order was given. The booms were necessarily on the port side. That had the effect of giving her a list to port. I wouldn't say how much of a list she had. When we jibed over the water rolled away from the side. We brought her on the port tack then, and the second mate, standing at the pump, heard a gurgling sound, and he looked over on the port side and saw this hole there, and then we called the captain's attention to it, and he saw what the trouble was, and got a piece of sheet lead and some canvas and nailed them over it after awhile.

Q. How had the pumping been done before that—whether it was in the regular course or whether there had been any difficulty about it?

A. Well, at the pump on the poop deck, when she would get kind of steady we would pump, and when the sea would break over they had to get away from the pumps; washed them right down there; couldn't stand there all the time; not on either deck. One of our pumps was between the poop and the mainmast, and the other between the main hatch and the poop hatch on the poop deck, about half way from the break of the poop to the cabin. The poop is about four and a half feet above the main deck. At some times we were not able to pump on the poop on account of the sea. That had been so all the night. We began to notice that the schooner was settling in the water after we went to the pumps, I think about half past eight in the morning. We had some work. We carried away the jib stay forward—that is the chain that connected with the stern—and we put a preventer on that—that is, after we

138 come on deck in the morning, say at breakfast time, seven bells. We didn't get breakfast that morning, only a little coffee. After we repaired that damage I told the second mate to let all hands to go to the pump to suck her out, and we had been to work on that some little time, when I noticed that she commenced to settle. After we pumped a little while and didn't get any suck the captain said to me, "She acts funny to me; I believe she is going

to fill up on us." I said, "I don't think so," and finally he says, "You had better get the boat ready." We cut the boat adrift and got all ready to leave her.

Q. This jib-stay that you have spoken of, how did that happen?

A. Well, jumping into the sea I suppose did it—the strain on it. I couldn't tell you about the sails of the Morrison; she always had good sails; she always carried good sails. I think she carried better sails than the most of vessels. I had not been below deck—I do not mean the cabin—before the time the boat was ordered cut loose. When this hole was discovered we nailed a piece of sheet lead and canvas over it temporarily, and we went on pumping. The weather had moderated a little then; there was a heavy sea going, but the wind had abated somewhat. I don't think there was much difference in the sea. There was more sea on the deck of the vessel, because she had so much water in her—because she kept getting, as we call it, loggy; as she settled she was more exposed to the waves. After we got this lead nailed over the hole, there was not much change in the water then for some four or five hours. We kept on pumping in the meantime, and we found we were freeing the
139 vessel; succeeded finally in freeing her ten to eleven hours after we discovered this hole. The sea went down a little that night. After we had stopped up the hold and pumped for two or three hours we sounded again and found that she was freeing herself to some extent.

Q. Did you notice whether or not after the sea went down and the wind abated that the pumps were having a greater effect upon her?

A. She made considerable water the whole time after that. After we had pumped her out, after we had freed her once, then she made considerable water the whole passage after that. The weather was more favorable tha latter part of the ten hours it took to free the vessel. After we had been pumping about two hours I told the captain I would go down in the lazarette hold and see if I could see how much water there was in her. This lazarette hold is in the after part of the vessel, between the rudder casing and the after bulkhead of the cabin. I went down into the lazarette, into the between-decks, the first time, and the water swashed about there so down in the hold that I couldn't get down in the hold, and I come back again. Just before dark, about six o'clock or somewhere around five or six o'clock, I took a lantern and went down again, and that time I got down onto the keelson of the vessel. There was about two or three feet of water there then. You get more water than there really is in the vessel by sounding, because the water runs up the line. I didn't go down into the hold again. I went down into the between-decks the next day; not into the hold, but in the between *the* decks, around the mainmast just forward of the hatchways.

I found that there was a lot of water there where it had gone
140 down around the mast—started the wedges around the mainmast and burst a hole through the mast coating. I found that it had gullied a place there out of the bulk cargo in between decks the whole width of the vessel and about ten feet in length.

In my judgment, that water got into the lower hold in various ways. There was some went down the bilge pump hole, where the plate came off. There was a lot went down around the mainmast and around the piece in the mainmast, and from the strain that the weather caused on the vessel, around the water-ways, probably. Three or four days after this we found there was a hole in the scupper, or we supposed a hole. We didn't find the hole until after we took it out. The water that I found between decks went down around the mast, probably some went down through the deck—a strain on the vessel.

Q. Was there any of that water between decks that could have been there through the bilge pump plate?

Objected to as leading, suggestive, and incompetent.

A. No, sir; it couldn't get there from the bilge pump—it is impossible—because the plug goes down in the bilge of the vessel. It is sealed up. It couldn't get in the between-decks from her bilges; it has got to go in the bottom of the vessel. I had been in her thirteen months up to January, 1884—not steady; then out of her one year; then I had been one trip previous to this trip—the second time of joining her.

Q. As first mate always?

A. I was second mate of her one voyage and part of another. During those voyages we carried coal most of the time—coal and ice; one cargo of sugar.

141 Q. How did her other cargoes compare in weight with the cargoes she was laden with this voyage?

A. They were all heavier. We weighed *out* 849 tons of coal out of her one trip.

Q. Now, state whether or not the Morrison was deeply laden on this trip.

A. She was not. I expect to sail soon in the J. S. Hoskins, built at Bath. She has bilge plates—one on each side of the main deck. I see a great many vessels that have these bilge pump plates and a great many have not. I know of a vessel has eighty-four of them. Before the Morrison sailed on this voyage I had been aboard of her and in charge in the captain's absence. As far as I know, that bilge pump plate before we sailed was in good order. I had seen it every day; can't help seeing it when you are walking around the deck. The trip before we painted all around it in Charleston.

Q. Did you take particular notice of it at that time?

A. Well, I don't know any more that than any other time; always looking around to see such things aboard a vessel, to see that they are all right. In my own estimation, there is no kind of examination of that bilge pump, unless it was detrimental to the pump, that could have enabled us to determine its condition any better than what we did make. Every time you unscrew the screws you are hurting it, because you are enlarging the holes. If you take and unscrew them every trip, in a little while there would not be any screws there at all—wouldn't have anything to hold the

screws. I am talking about taking the screws out of the plate—the screws which fasten the plate to the water-way. Inspec-
142 tors are aboard of her every trip. They ask where the vessel was built and the captain's name and owner's. They asked when she was recaulked, all parts of her, and go down in the hold and take a general look around in the hold. They make the inquiries of me if the captain isn't there. He isn't very often there.

Q. I want you to state whether or not any inquiries have ever been made of you or in your hearing by insurance surveyors which would lead you to think that any special examination was requisite for the seaworthiness of the vessel respecting those bilge pump plates.

A. Never. I have seen more than a hundred inspectors aboard the different vessels I have been in and about thirty on the Morrison and on the other vessel that I was on that had a bilge pump plate. I never heard any of them say anything about a bilge pump plate; I never saw one of them look at a bilge pump plate.

Q. Now, let us recur, Mr. Cook, to the bilge pump plate on the Morrison. You found, as I understand the story, that it was gone?

A. Yes, sir, and there was a hole there where it had been, and we put some lead over that. After we arrived at Savannah we took the lead off and fixed it. We took and made a plug and plugged up the hole and nailed another piece of sheet lead over it; found the wood perfectly solid. It is there to-day as I fixed it. The holes where the screws had been had a kind of ragged look where the screws were torn out. The wood looked all sound. I don't know as I could describe the color; it was yellow pine and had the normal appearance of yellow pine in good condition.

Q. Do you remember about when you discovered that
143 there was something the matter with the mainmast?

A. I don't remember just when we found that out; I couldn't say exactly when we found it out. I had been below in the meantime and seen the swashing, where the water had gone down and swashed. When I found it out we made wedges and drove them in solid with the other ones, and then put a temporary mast coating on when we got there. I remember that we put a new coating on. I have been going to sea ten or eleven years and during that time have had some pretty stormy voyages. I never was in a breeze of so long duration as that was. I kept the log of the Morrison.

Q. I have shown you the log since you have been here, haven't I?

A. I believe you have, sir. I recognize that as having been made by me. I haven't looked over the whole of it; I looked at some of it. The account of that storm as it appears in the log is not exaggerated. It does not express the full severity of the gale, because I can't use flowery language enough to make it out in as good shape as a notary could sitting here. That is all. I haven't words at my command sufficiently strong to express the severity of the weather.

Cross-examined by Mr. BLACK:

I have sailed in the Hoskins, the Mary S. Wiley, Ethel Merritt, and Frank H. Haws, and Helen M. Foster, Amazon, East Wind, Winnie Lawry, and Mary G. Kern.

Q. Please look at the log book and say whether you came to New York on the Morrison and kept the log book all that time.

A. Yes, sir. I do not want to look at the log book to know that.

144 Q. Please look at the log and tell me if all the entries in it after the voyage from Weymouth to Savannah are in your handwriting.

The witness was shown the log book which was heretofore marked Libellants' Exhibit B, March 25, 1884.

A. Those in pencil there is not my handwriting. All the ink is in my handwriting. The last entry in my handwriting is Wednesday, the 19th of March, 1884. The vessel was lying, when that entry was made, at pier 6, East river, New York city. I sailed in her when she left New York on her voyage after March 19th and started a new log book then. I remained connected with that schooner, I think, about twenty-two months after that. I joined her the 10th of November, 1883, and I left her July 4th, 1885, in Philadelphia.

Q. When you say that you have looked through part of this log before you gave your evidence now, when Mr. Adams, the counsel who examined you, showed it to you before examining you, did you look at the parts relating to the time when this seven feet of water was in your hold or thereabouts?

A. Not particularly. I wouldn't swear whether I saw it there or not when I was looking over it. I didn't pay any particular attention to the log. I couldn't say whether an alteration had been made there or not. There was something had been done there. It looks as though it had been altered. It looks as though it had been scratched over. That alteration is not in my handwriting. I first noticed it to-day. My attention was called to it by Mr. Adams; he wanted to know if I could see any alteration in it. I told him I couldn't tell him whether there had been any alteration or

145 not. I recognize that if there were a figure seven there, it has been marked over again. I couldn't remember now whether it was seven feet there.

I went down into this lazarette between nine and ten o'clock in the morning the first time. I didn't take any light down the first time. It wasn't very light. I didn't go way down in to see. There was too much noise around there. It scared me a little. I found when the vessel would roll the water would spurt up through the manhole, spattering way up overhead, when she would roll. I remained in the lazarette, or between-decks, not more than ten or fifteen minutes. That was after the fact that the bilge-pump plate and cap were gone had been discovered—about, I should say, an hour or two—and during that hour or two we had been pumping

when we could pump. The pump on the main deck we could not pump at all times. When there was a chance to pump we pumped on it, at both pumps. In the meantime we had turned the boat over. I think this was before the discovery of the loss of the bilge pump plate and cap. I went below a second time about six o'clock of the evening of the same day. I went way down into the lower hold, to the keelson. I think there was about two or three feet there. Bags of cargo were there in the lower hold. I was standing on the keelson; water wasn't quite up to the top of the keelson. These bags were piled on both sides of the keelson and on the top as well. I took a light down with me at that time. I remained just long enough to see how things was and come up again. A sailor went with me.

I went the next day into the between-decks, somewhere around nine or ten o'clock in the forenoon. I got onto the guano
146 that was up level with the between-decks there, and I took a shovel and dug a trench till I come to the mainmast. I dug out the guano that was there. It wasn't way up to the deck there, around the hatches. When I commenced, that next to the hatches wasn't wet, but when I got in a couple of feet it began to get wet, and as I dug down it was wet. In the hatchways there wasn't any guano at all; not in the between-deck hatchways.

Q. What was the space from the top of the guano, as piled up, up to the lower side of the upper-deck beams?

A. Around the hatches there, I think, where I dug in there was two feet clear there. In her wings she was filled up pretty well all over—not way up—say a foot of space. I had a light down with me while doing this digging. A couple of sailors were with me. I got forward of the mainmast five or six feet because the water had gone down there—had gullied the guano all away from it. Water was going across all the time—that is what I went down there for—swashing about the whole width of the vessel and about ten feet in length. I think she was about 33 feet and a half wide there. I couldn't tell you how deep it was. If the vessel had been still, there would have been two feet of water on the level there and about ten feet running fore and aft, about seven or eight wide at the narrowest place. I should say I was down there an hour. So as to get the water down to the pumps down there in the between-decks, I took a crowbar and broke holes in the between-decks. When I burst that hole through the water went down in the lower hold. When I was down there I noticed daylight showing through; I could see up, right up around the mast, where the wedges was started; they wasn't all started.

147 Q. Did you enter in the log anything about finding this hole around the mast?

A. I think it is in the log there where we found the wedges had gone through the mast coating. I don't remember now. We don't enter every little thing that transpires like that. I don't know but a thing like that would be proper to enter.

Q. What makes you think it was the day after the bilge pump plate was gone that you found this hole around the mast?

A. Well, I have to guess at all those things. I can't tell just when it was. I know we found it. If the log contained an entry, that would be more reliable than my memory.

Q. Please look at the log under date of Tuesday, the 15th of January, 1884, and say whether it does not contain an entry, that the wedges around the mainmast had started up and made a hole in the covering.

A. Yes, sir. One bilge plate was on starboard side of her poop deck, right in her ways, about two feet aft of the break of the poop. The one on the port side was on the main deck in the water-way. I never saw it opened previous to that time. When I saw it opened I don't think there was any pipe there or anything else which had gone down through this hole into the space between the frames and between the planking and the ceiling. In the side of the vessel, in the between-decks, and in the lower hold were those air streaks, which make an opening from the lower hold or between-decks, wherever they are, into the space between the ceiling and the siding.

Q. What would prevent water which entered in that space through this plate from coming into the main deck or into the between-
148 decks or into the lower hold through these air streaks?

A. The air streaks are always covered up with strips of board.

Q. What would prevent those strips of board from being pushed off?

A. Well, nails would prevent that; that is all.

Q. If the nails held?

A. No; water got down into the hold and struck against the side of them. These pieces of board were not caulked on the air streaks, no more than what the guano filled them up. These pieces of board did not match right in like cork in a bottle; they go right over. The purpose of these boards was to prevent cargo getting down that space. That spar which I spoke of in my direct examination was entirely loose. I should say it was from 38 to 40 feet long; it was a gaff, a cargo gaff.

The schooner at the poop deck was about 33 feet wide. The spar had been lashed in the waist to ring bolts fastened to the stanchions that carry the bulwarks. These ring bolts were about a foot and a half above the deck, about half of the stanchions. This spar was lashed there when it was not in use. It was used once the other trip. I was in her, but not that trip. I couldn't tell how long it had been in the position I have described.

Redirect by Mr. ADAMS:

I was in Gonaives, Port au Prince, Hayti, on January 25th, 1886, at the time of the trial.

Q. Do you know anything about the classification of vessels that have bilge pump plates?

A. Every vessel that has got them has an A 1 rate.

Q. You mean by that it doesn't make any difference?

A. No, sir. This vessel I am in rates fifteen years A 1.
149 She has got the highest rate going, and she has got them.

Q. Now, I want to call your attention to this entry about the seven feet which Mr. Black has asked you about. Do you know whether or not that figure 7 is in your figures?

A. I know that whatever is there now isn't in my figures—that is, I know there has been something put over it. I don't know, but it looks so.

Q. Looks so to you?

A. Looks so to me, as if it had been marked over; either there was a 7 there and my figures did't suit them just right, and they made it plainer. I do not know whether or not there has been an alteration; there is some indication of *d*omething having been done to it.

Q. Now, entirely apart from the log and anything that has been said here to-day, have you a recollection of what that sounding was?

A. I think it was seven feet, as near as I can recollect. The guano that I found between decks was all wet there in that particular place. The water must have come from around the mast and the water-ways. It couldn't come from nowhere else. The water that was swashing back and forth was about the consistency of mud.

Q. With respect to the date, Mr. Cook, at which you found things in that condition between decks there seems to be a discrepancy between your direct and cross-examination?

A. Well, I tell you I can't remember. It is impossible for me to remember anything like that for four years. This part of it—that is, as to the date—I can't remember just the date it was done.

Q. Have you any doubt about the facts being correct as you stated?

150 A. Not in the least. I do not know when that spar was lashed on the stanchions; there was everything to indicate that it was properly lashed; that spar we broke afterwards in Cuba in taking sugar out. It wasn't lost on the voyage.

Q. Had you any reason to think it was damaged in any way by reason of it subsequently breaking?

A. No, sir; no more than rot.

By Mr. BLACK:

I think I made only one voyage in the Morrison after this one from Boston to Savannah. I had made other voyages in the Morrison to Boston, Philadelphia, and Baltimore. The one I made to New York was in the following winter, I think.

Q. Was there anything to prevent the water which came in around the mast from getting in the lower hold—that is, I want to know whether the mast between decks was water tight?

A. No, sir; the mast where it goes down through the between-decks was not wedged. What water struck the mast must go down.

Q. How do you account, then, for a quantity of water being still between decks when you went down there?

A. I think there was more water went down around the mast and around the water-ways than the small space around the mast would let down in the lower hold—that is, it had got in faster than it leaked through. We have no way of telling when the damage was first done to the mast or when it first commenced to leak there. We know the water got in the between-decks some way, but we didn't know how it got in there.

By Mr. BLACK:

151 From the break of the poop to the after part of the mainmast was three and a half feet. The mainmast was right in the middle of the length of the vessel. When I was down between decks I don't think there was any water to amount to anything on deck to come down. The schooner was loaded from sixteen to eighteen inches by the stern. We calculated to have eighteen drag. This space around the mainmast where this gully was was forward as well as aft. This space with the water washing was more forward than there was aft of the mast and more water. We had 200 bags of nitre in the stern of the vessel and it all dissolved. There was nothing left of that. That raised her stern. I didn't notice that the guano was packed around the mast, so as to form a kind of cement. I went down there about ten or eleven o'clock of the next day after we had pumped the vessel out—after we had got the first suck on the pumps. The siphon pump was located on the main deck nearest the mainmast. It had two brakes. The one on the poop deck is considered the best pump. There isn't a terrible great difference.

Q. How much did the vessel lighten up when you got the water up—that is, how much more freeboard did she have than when the water was in?

A. I don't remember. It lightened her up some, of course. I don't think she would lighten up much to amount to anything, because of all that stuff down there being wet.

Q. Didn't you pump up a lot of this stuff with the water that came out?

A. The water was all black. It would have been black all the same if there wasn't any guano in it. A coal vessel, the water is always black. This nitre which was dissolved must have lightened her up some aft. Some of the guano in the bags must have
152 dissolved. It was as hard as a rock when we unloaded at Savannah. I don't think some of the bags were broken. They had to break some up to get them out.

By Mr. ADAMS:

As to the date of discovering the water between decks and the date the wedges had come loose, I don't remember when that was; that is as near as I can judge; but I can't remember just when that was we did them. We repaired the mastcoat just as soon as we found out there was a hole there. We lifted up the coating from

the deck and knocked the wedges down, put extra wedges in, and then took a piece of canvas and put a temporary mastcoating round and over the other one and nailed it down again.

Q. As I understand your testimony, you hadn't refreshed your memory at all with respect to this before you were examined today?

A. No, sir; I had no chance to look at my log book. When that nitre was dissolved it made a difference in the trim of the vessel. She wasn't down by the head—that is, she wasn't drawing more water forward than aft—but she was down by the head for her trim; she was out of her regular trim; she ought to have more freeboard forward, and did not after the nitre had dissolved. That nitre was stowed away in the stern of the vessel, in the lower hold. I don't know whether it was stowed 100 or 200 bags deep; I don't think it was much above the keelson.

Deposition of Stephen S. Lavender, Taken December 28, 1887.

By Mr. ADAMS:

I am the master of the Edwin I. Morrison and was in Jan., 1884.
I have been examined before in this action.

153 I have a pretty distinct recollection of the weather on the voyage; it is a thing I will never forget. The bad weather commenced the evening before I discovered the loss of the bilge pump plate. The weather was what I call a terrific gale of wind. It commenced about four o'clock in the afternoon. We commenced to shorten sail, to put her under a double-reefed sail. She was shipping water in all parts. Before we shortened sail she commenced to ship water. The case always is when the vessel begins to labor heavy, then we shorten sail—always. After we shortened sail she commenced to labor very bad—six or seven o'clock in the evening; labored heavily all night. Before the loss of that bilge pump plate the schooner took water through the cabin window, doors, down the booby hatch, and all parts. That water went into the hold. We have two entrances to our cabin—one in the forward part and one in the after part. The cabin is situated in the after part of the poop deck. One entrance is aft, on the port side, and the other is forward, on the starboard side. The top of the house is three and a half feet above the poop deck. I noticed that we took water in there while we was eating supper that same evening. We set our table right near the gangway—the entrance to the cabin. It is unusual and indicated it was bad weather, very bad—a very rough sea. All through the night time water forced its way down through the windows and also through the gangway; the water that got into the cabin went down into the hold.

Q. Did any water get down in any other way into the hold before this bilge pump plate came off?

A. Well, it can go through the water-ways. As I stated before, I found a strain in the water-ways, I think, but I ain't positive, but I think I testified to that before.

154

Q. What is the fact, whether you testified before or not?

A. Well, yes, sir; it did. The water going down the water-ways would not touch the cargo between decks. It would find its way to the lower hold, the same as that which went down the bilge pump. The pumps sucked with the water going down that way and through the cabin and into the cargo in the lower hold, because the water goes through the hold on top of the guano; that guano absorbs the water to a certain extent, and that water remains on the guano till it finally finds its way through.

Q. Taking the weather into consideration, from the evening before up to the time that this bilge pump plate was lost, I want you to state whether or not, in your judgment, the cargo in the lower hold was wet.

A. It was. I can't tell to what extent. I noticed all through the night that when the pump would suck we would pump guano. I could see it, and the pumps pumped heavy. The pumps sucked at four o'clock in the morning—the vessel was sucked out then.

Q. Did that indicate whether or not the cargo was wet?

A. It indicated that the cargo was wet where that after pump was—where we was pumping—because we was pumping guano. We knew by that the water had been at the guano. That was at four o'clock in the morning. There is no way of telling how much water went down the bilge pump plate, nor any way of telling what portion of the damage was due to the water that went down there and what went down another way. The vessel made water again after that was discovered and plugged up. She made water all the time. The weather continued very boisterous,
154½ very, the entire voyage.

Q. How else did she make water after the bilge-pump-plate hole was covered?

A. Well, she made water around her mast. We found, I think it was the next day, wedges in the mast was worked out, and also something worked a hole in her mast covering or knocked a hole through that, I don't know what done it, and water came down there, and then she had had this load of water in her, I call it, and no doubt it strained the vessel, and in rough weather which we had afterwards she would make water by this strain all over, in her seams mostly.

Q. Did she make any from taking it on deck?

A. Yes, sir. This guano had been wet, and it settled the vessel more or less in the water and made her very heavy-loaded, and then any little common breeze she would ship water, and it would force its way into the cabin afterwards.

Q. You have spoken about being heavily loaded. State whether or not your schooner was heavily loaded as to cargo before she met with this weather.

A. She was one hundred tons of cargo light.

Q. Had the season of the year anything to do with it?

A. No, sir. Before the bilge pump plate was lost the vessel did not act like herself at all. I have been in the vessel so long that I can tell the least minute anything is the matter with her.

Q. What is your judgment about it, taking into consideration the weather she had been subjected to and the water she had taken in before the loss of the bilge pump plate, whether she had settled any or not?

A. I think she had.

155 Cross-examined by Mr. BLACK:

The Morrison is 135 feet keel and 155 feet over all from the taffrail to the knightheads. From the taffrail to the after end of the cabin is nine or ten feet. The cabin from its after to its forward end is twenty-three feet. About thirty feet forward of the cabin the poop deck runs. The poop deck stops two feet aft of the mainmast. She is a three-masted schooner. The cabin had twelve windows besides the skylight above the deck. These windows had wooden shutters, fastened when they are closed with a grating outside of them. They had a grating and a shutter and a sash—three coverings.

The poop deck was three feet above the main deck. The bottom of the sash was 6 inches above the level of the poop deck. There is a water-way around the cabin. Those glass sashes rise up and down. They close and fasten themselves. They don't hold themselves up. We have to prop them up with sticks inside, and those sashes outside fit right in. We take them out and put them in. The gratings are fastened in with a button to keep them there all the time. The grating is made of wood with wire bars. Those gratings, shutters, and windows were in good order. I know they was. I wouldn't have anything more done to them. In my opinion, they were as good as they needed to be to keep out the seas. I don't think they could have been better. The doors or companion-ways were double doors of wood, swinging on hinges, apparently fitting close—as close as any doors will fit. The after gangway is a single door; the forward gangway is a double door. The water that came down the cabin came in both the after and forward gangway. It came sometimes, when a sea
156 would strike it with much force, a bucketful or more, and then it would dribble after that. The most that came at a time was a bucketful. It ran down the companion-way onto the floor of the cabin. The cabin sets on the main deck. The floor of the cabin is the floor of the main deck. That was a caulked floor when she was new. It has never been recaulked, to my knowledge. It was slack. By slack I mean open. We have a hole to let the water through when the water comes into the cabin. We have a canvas over the floor, and it would run off the canvas and run down through the hole. As it was slack, it went down the hole and through the seams as well. The hole which was to carry the water down from the cabin into the bottom of the vessel was in the port forward corner. It did not connect with a pipe to carry it down so it wouldn't injure the cargo below. It was left open when we had no cargo under it. When we had cargo under it we plugged it up.

Q. Was it plugged up on this occasion?

A. I think it was at times. I don't remember whether it was plugged up on this night when we were shipping these seas. That cabin was twenty to twenty-four feet wide. It didn't run the full width of the vessel. There was a gangway on each side of it on deck. On each side of it between the poop deck and the main deck it was open. The house didn't run out that far. It was for stowaway places. You went down from the deck through the lazerette or through the poop deck.

Q. By the lazarette you mean the hatch aft near where the wheelsman stands?

A. Yes, sir.

Q. Whereabouts was this pump aft located—on the poop deck or on the main deck?

A. On the poop deck.

157 Q. And that is the one that you said you knew they were pumping up guano?

A. Yes, sir. This pump on the poop deck was eight feet forward of the cabin. There was cargo stowed under the cabin in the lower hold. There might have been some under the cabin in the between-decks running from the pile, but they intended to make the bulkhead at the forward part of the cabin so that any water that went through the cabin deck would strike on the between-decks, floor or deck. That was a tight place between decks, except the scuppers. I don't recollect when that had been caulked. It was while I was mate of the vessel; I should say four years before this. It was a hard-pine deck, which you cannot keep perfectly tight. I didn't try it. I couldn't swear whether it was tight. As I specified before, it was a hard-pine deck that you cannot keep perfectly tight. It was apparently tight when it was new caulked. The scuppers in the between-decks were located all along the sides of the vessel, entering into the ceiling. I think they were put there so as to carry water that ran in the between-decks down alongside of the frames, between the ceiling and the planking, and if they were in good order that is what they would do. This poop deck was about three feet above the main deck. There was a rail around the poop deck about a foot and a half or two feet above the poop deck—a fly-rail on stanchions.

Q. Was it while you were lying to that this water came on deck and went down the cabin?

A. Not at the first time. We were on the port tack. She heeled over about three, four, or five streaks. When she heeled the water came aboard from the water-ways. The roll of the vessel

158 forced the water clean across. I don't know how much water came on her deck. I did not go to bed that night. I was mostly on deck all night. It was a very bad night—cloudy, black, raining. I hove to that night just as soon as we could get her under short sails. I don't know the right hour. It was before midnight. We started, I think, about four o'clock to shorten sail, and just as soon as we got the sail short to heave to we hove to. To shorten sail as much as we did took us all night. During the night we did

lie her dead to. We were lying dead to three or four hours, and when we lay dead to we headed into the wind as near as we could. We would come up and yaw off and come up and yaw off. She can't yaw off but the one way. I think we had the storm-trysail and the two-reefed foresail and the forestaysail. I don't recollect whether we had a two-reefed mainsail or not. The storm-trysail was set on the mizzen-mast.

There was water went down through the cabin deck which could reach the cargo by going through floor on the between-decks and then running up onto the guano in the lower hold. It could get onto the guano in the lower hold down by the mast; down by the stanchions that ran up between decks. It is not perfectly tight; water always runs down.

These stanchions that hold the cabin deck rest on the keelson, on top on the other stanchions. They don't rest on the deck. The stanchions are put there before the deck is laid. There were no stanchions in our cabin. This cargo in the lower hold was stowed nearly way aft, ten feet from the run of her—that is, ten feet from the peak. The cargo of guano commenced ten or twelve feet from her stern post. I saw it in Boston after it was stowed there.

159 I went down the lazarette hatch; then I went into the lower hold. There I found bags of guano slanting, about 3 or 4 bags forward. Her cargo in the lower hold was not near up to her between-decks. I should say there was four or five feet from the top of the cargo to the between-decks. The mizzen-mast comes down just forward of the cabin bulkhead; just joins right on at the forward end of the cabin, as close as you can put it. I have owned a piece of this vessel about 6 or 7 years. I live in Provincetown. I think Mr. Cook, the first mate, is a truthful man. We grew up together. He lives in Provincetown.

This vessel when she had all this water in her was a little more loggy than she was before. After we had pumped the water all out she was a foot and a half deeper than before. That foot and a half represented 130 tons, perhaps 150 tons, of additional weight, and that made heavier weather. That additional weight of water strained her at that time. During the night, when I noticed the pumping of the guano, I handled the pumps myself at times—every time I was on deck. Towards the sucking it would throw out guano. The pump box separated the guano from the pump well, but the box wasn't perfectly tight. The pump has an iron pipe and a box outside of the iron pipe. This water comes up the iron pipe and can't get near the pump box; has to go out on deck. The iron pipes was tight. No water that came up that pump could go back again and leak out into the between-decks and into the lower hold. The lower end of that iron pipe comes four or five inches from the bottom of the vesssel into the limber streak. That was the opening for the water to reach the end of that pipe below the ceiling of the vessel. This vessel had air streaks, one between

160 every beam and between every timber. Those air streaks were four or five feet in length and three and a half inches

in width between the hanging knees which come under the beams and two-thirds up of the height of the between-decks.

The vessel was salted when she was new; also again I salted her when I was mate of her, five or six years before this thing. I salted her myself. We had a cargo of salt and I salted her. I didn't salt in the place where these bilge pumps went down.

Redirect by Mr. ADAMS:

It was unusual to have water on our poop deck, and indicated very bad weather.

Q. As to the between-decks being slack, state whether or not your between-decks were in the ordinary condition of vessels in good, seaworthy order.

Objected to.

A. They were in ordinary condition, sir.

Q. State whether or not any water from this bilge-pump hole could have reached the cargo between decks.

A. No, sir.

Q. Supposing altogether on that rod and line you got seven feet, would that indicate more or less water in the hold than seven feet?

A. Well, I should say there was more water in the hold than we got. We sounded amidships, where the pump is, in the 'midships of the vessel. The vessel keeling, there would be more water in the wings—that is, it wouldn't be any higher, but as it goes in the wings it covers more space. In sounding in amidships, we could only get what there was in amidships, and the balance would be in the wings. We had a list to port when I got that sounding.

161 The officers might have looked at the line when I sounded and said nine feet; I estimated about seven. The officers might have said nine to themselves, but I never heard any of them saying nine. My estimate from what I saw on the line was that there was about seven feet of water in the lower hold. I never measured it. The greatest height was amidships in the neighborhood of the mainmast. It reached at that place within three or four feet, at the highest place of the deck. When I spoke of pumping guano I meant water containing guano. It did not get too thick to pump.

Q. When your pump began to suck was there any difference in the consistency of what it brought up from the time you commenced?

A. Yes, sir; it was thicker.

Q. I want to know, captain, whether or not your cabin floor was in an ordinary condition.

Objected to.

A. Ordinary.

Q. Supposing this water that you got into the cabin hadn't found its way out, what would have been the consequence?

Objected to.

A. I would have made it find its way out.

Q. Is there any way of getting it out excepting to let it go into the vessel?

A. No, sir; except without swabbing it out, and then you can't get all—you could not have swabbed all the water out that went into the cabin that night because we couldn't get it all; it would go under the mate's berth and under my berth.

Q. Was it because there was little or much, or what, that you couldn't get it out by swabbing?

162 A. Well, there was a little. The quantity of water that got into the cabin that night was too great to be taken out by swabbing. If it hadn't gone into the vessel we wouldn't have been able to live in the cabin; it had to have an outlet somewhere.

163 *Deposition of Maria Y. Lavender, Taken February* 2, 1888.

Mr. Kneeland, for libellant; Mr. Adams, for claimants.

By Mr. ADAMS;

I am the wife of captain Stephen S. Lavender, of the schooner E. I. Morrison, and have been for fifteen years. I have been accustomed to going to sea with him for nearly six years. I was on the Morrison on her voyage from Weymouth to Savannah in January, 1884. The general character of the weather during that voyage was very stormy—very rough. I have never made a voyage on which I had such stormy weather, either before or since. I remember hearing of the leak being discovered from the loss of the bilge pump plate. The weather previous to that was very rough, windy weather. That was discovered about ten o'clock. Prior to that and during the night it had been raining and blowing and very rough heavy seas—the seas breaking over the vessel, the after part. I had not been out of the cabin at all during the night. During the night the water came in; forced its way in around the windows and skylight and the after companion-way and everywhere it could get in. I never remember a voyage before or since that the water got into the cabin in that way. Everything was drenched with the exception of the berths. The water did not get up as high as the berths. The water did get in in sufficient quantities to swash around with the motion of the vessel, and it had been doing so all through the night. We were making preparations to leave the vessel the next morning.

164 Q. State whether or not, if the water which got into the cabin had not found an exit somewhere, you would have been drowned out there. If all the water that came into the cabin had remained there instead of leaking away, or whatever became of it, was there enough to come up to the berths altogether?

A. Well, I do not think it would come up to the berths, because I think there are other places.

Q. If all the water that came into the cabin had remained there instead of leaking away, or whatever became of it, was there enough to come up to the berths altogether?

A. Well, I should think so. The berths are about knee-high above the floor. You go down five steps into the cabin.

Cross-examined by Mr. KNEELAND:

We had bad weather for three or four days from the time we left Boston, nearly all the passage. This bilge pump plate was discovered to be gone on the 10th, I think.

Q. Did the water come into your cabin at any time during that voyage before the night of the 9th, the night before you lost the bilge pump plate?

A. A little; from the first of the bad weather. I don't remember the date we left Boston for Weymouth. The 14 windows of the cabin were closed and had outside protection. The after companion-way was closed.

Q. How much water came through the windows at any one time?

A. It is hard to state. There was a great deal of it forced its way in, all around the window. At the time this water was com-
165 ing in I was in my berth, most of the time. The water that came in the after companion-way forced its way in around the doors. The companion-way had a single door, closing on hinges. I heard the mate speak of the loss of the bilge pump plate. At that time I was in the cabin. There was a great deal of water in the cabin; it is hard to tell how much. My husband has not called my attention to any of the particulars or anything that happened.

Redirect by Mr. ADAMS:

Q. How deep did you know the water to be there at any one time and as near as you can tell with the vessel in motion?

A. Well, it was, I should think, as high as that (indicating a box in the room which is two feet high).

Q. The object that you pointed to as indicating the depth of the water is not quite a yard high, is it, apparently?

A. No; not quite.

Q. Did that bring the water up nearly to the berths in the cabin at times—I mean with swashing back and forth?

A. Yes, sir.

Q. State whether or not you were in any apprehension of danger. Just describe as well as you can what impression was made on your mind by the force of the elements that night.

A. Why, I thought we should sink. I thought we should go down, of course. I expected we should.

Q. Did that impression continue during the night or was it greater at times or less, as well as you recollect?

A. Well, all through the night.

166 Recross by Mr. KNEELAND:

The water was not as deep as I have stated all the time during the night. It was not all out of the cabin at any time during the night. I remained in my berth all night.

By Mr. ADAMS: There was no place I could be dry there excepting my berth.

167 LIBELLANT'S EXHIBIT "B."

The log consists of entries day by day from Tuesday, November 13th, 1883, to Wednesday, March 19th, 1884, the material parts of which are as follows, viz:

Journal from Boston Towards Charleston.

Nov. 15th.—First part of this day strong breeze from the N. W. Nansett lights bear west ten miles from where I take my dep't. Wind moderating and starting to north. 8 a. m., made all possible sail. Latter part of this day calm. Pumps attended to. This day contains twelve hours to commencement of sea time. Latitude obtained by observation and dead reckoning; longitude by dead reckoning.

Nov. 16th.—First part of this day, light breeze from the S. W. and dying out to a calm. 6 p. m., breeze springing up from S. E. Middle part, strong breeze from S. E. and raining. At 2 p. m., wind came in to N. W., with a squall, and increased to a strong gale. Furled all light sails and two-reefed all around. Latter part, strong N. W. gale. Pumps well attended. No latitude; no longitude.

Nov. 17th.—First part of this day, fresh N. W. gale. 4 p. m., wind starting to north and moderating. 3 p. m., set bobjib and kept off of W. S. W. 12 o'clock, set whole foresail and jib. Latter part, moderating; set all possible sail. Crew variously employed. Found by observation that during the breeze she has made a dead drift to south of about two miles per hour. Pumps well attended to. So ends this day. Latitude and longitude obtained by observation and dead reckoning.

Nov. 18th.—First part of this day calm. At 4 p. m., light air from the S. W.; tacked ship. Middle part, gentle breeze from the S. W. and fair weather. 3 a. m., wind died out to a calm. Latter part, good breeze from the south. Pumps attended to. So ends this day. Latitude and longitude obtained by observation and dead reckoning.

Nov. 19th.—This day begins with light breeze from the S. S. E. and fine. At 3 p. m., exchanged longitude with a ship and find him to be one degree to eastward of us. Middle part, very moderate. 4 a. m., wind came from the north; several vessels in sight, bound north. Latter part, light breeze from north. Pumps attended to. Latitude and longitude obtained by observation and dead reckoning.

168

Nov. 20th.—This day begins with light breeze from the north. Middle part, wind to the east and fine. Exchanged longitude with a brig bound to north; found him to be twenty miles to eastward of us. Latter part, fine weather, wind N. E. Crew variously employed. So ends this day. Pumps attended. Latitude and longitude obtained by observation and dead reckoning.

Nov. 21st.—This day begins with a light breeze from the N. E. 6 p. m., wind S. E. and very moderate. 8 p. m., sight Hatteras light 2 points under lee bow. Midnight, tacked ship off shore. Wind hauled to south. 2 a. m., tacked in again, wind starting back to S. E. 9 a. m., tacked ship in. 11 a. m., tacked ship off. So ends this day. Pumps attended to. No latitude; no longitude.

Nov. 22nd.—This day begins with fine weather and gentle breeze from the south, having Hatteras light bears N. N. W., distance fifteen miles, from which I take a new dep't. At 7 p. m., made Cape Lookout light two p'ts under lee. 4 p. m., tacked off shore. 10 p. m., tacked in again. 4 a. m., tacked ship and set outer jib. Latter part of this day very fine and moderate. Pumps attended. Latitude obtained by dead reckoning; longitude by observation and dead reckoning.

Nov. 23rd.—This day begins with fine weather and light breeze from the S. S. E. At 7.30 p. m. made Frying Pan light. Ship one and a half p'ts under lee bow. 10 p. m., tacked ship and stood off until midnight, then tacked again. 2.40 a. m., lightship bears north five miles, from which I take a new dep't. Latter part, fine and moderate. So ends this day. Pumps attended. Latitude obtained by observation and dead reckoning; longitude by dead reckoning.

Nov. 24th.—This day begins with a light breeze from the S. S. E. 8 p. m., made Cape Romain and Georgetown lights; tacked ship. 11 p. m., tacked ship. All the middle and latter part of this day dead calm. Several vessels in sight. Crew variously employed. So ends this day. Pumps attended. No latitude; no longitude.

Nov. 25th.—First part of this day calm. 6 p. m., Cape Romain bearing W. by S.; took a pilot. Passed lightship at 6 a. m. and hove to off the bar to await the tide. 2 p. m., passed in over the bar, grazing the bottom going over. Anchored off South Carolina R. R. wharf at 3 p. m. Furled sails and put on
169 covers. This day contains 36 hours to commence harbor log. Pumps well attended. So ends this passage.

Journal Laying at Charleston.

Nov. 26th to Dec. 7th.

Nov. 30th.—At 7 a. m. commence to load rock; finished at 11.30 a. m.; 450 tons on board. Draft of water, 12 ft. 6 aft, 11 ft. 7 forward. Towed around to S. C. R R. wharf to load cotton.

Dec. 1st.—This day fine weather. Receiver on board 296 bales of cotton. Bent new mainsails. So ends this day.

Dec. 2nd.—Fine weather all this day. Washed off deck and attended pumps.

Dec. 3rd.—Fine weather all this day. Received on board 227 bales of cotton. Crew variously employed. So ends this day.

Dec. 4th.—All this day light rain. Received on board 130 bales of cotton. Crew employed about ship. Pumps attended. So ends this day.

Dec. 5th.—All this day cloudy weather. Received on board 203 bales of cotton. Crew variously employed. Pumps attended. So ends this day.

Dec. 6th.—All this day fine weather. Received 193 bales of cotton; left 45 bales on dock over night. So ends this day.

Dec. 7th.—Fine weather all this day. Received 50 bales of cotton to complete cargo, 1,099 bales. Finished stowing at 3.30 p. m. Took off sail covers and got ready for sea. Lower hold, 479 bales; between-decks and poop, 620. Draft of water, 14.4 aft; draft of water, 14.2 forward.

Dec. 8th.—Towed down to the bar. So ends this day of 12 hours to commence sea time.

170 *Journal from Charleston Towards Bosion.*

Dec. 9th.—This day begins with fine weather and light breeze from the south. Passed out over bar at 1.30 p. m.; struck twice going over without damage. 3 p. m., Rattlesnake light-ship bears north, dist. 3 miles, from which I take my dep't.; made all possible sail. 7

p. m., sighted Cape Romain. 10 p. m., passed out of sight of Romain. Latter part, light breeze from the south. Pumps attended. So ends this day. Latitude and longitude obtained by observation and dead reckoning.

Dec. 10th.—This day begins with fine weather and gentle breeze from S. W., hauling to north and breezy. 6 p. m., fresh breeze from the north; furled all light sails; wind starting to N. E. and increasing to fresh gale; two reef all around and furled flying-jib. Middle part, moderating. 8 a. m., turned reefs out fore and main and jibed ship; set fore and main topsails. So ends this day. Latitude and longitude obtained by observation and dead reckoning.

Dec. 11th.—This day begins with fine weather and gentle breeze from the N. N. W., with heavy swell. Middle part, breezing. 3 a. m., reefed spanker and mainsail; fresh N. E. gale. Latter part, moderating; turned reef out main and set topsails. Pumps well attended. So ends this day. Have this day allowed 2½ knots per hour; easterly current. Latitude and longitude obtained by observation and dead reckoning.

Dec. 12th.—This day begins with fine weather and light breeze from the N. E.; found by obs. current setting her to N. E. 6 p. m., calm. 8 p. m., breeze springing up from the S. W., starting to N. W., and increasing to fresh breeze; furled all light sails. 7 a. m., reef spanker and mainsail; wind increasing to a strong gale. Latter part, fresh N. W. gale, with heavy sea. Pumps well attended. Latitude and longitude obtained by observation and dead reckoning.

Dec. 13th—Saw school of sperm whales. First part, strong N. W. gale, wind starting to north, tacked ship and reefed foresail. 6 p. m., moderating. Middle part, still moderating. Turned reefs out fore and main and set flying-jib; set topsails and turned reef out spanker; calm. Latter part, light air from the west. Pumps well attended to. Latitude and longitude obtained by observation and dead reckoning.

171

Dec. 14th.—Begins with fine weather and gentle breeze from the S. W., and gradually breezing. Middle, strong breeze and cloudy. Latter part, strong breeze, with light rain. Passed a sunken wreck. Got no noon obs. Pumps attended. So ends this day. Longitude and latitude obtained by dead reckoning.

Dec. 15th.—Begins with strong breeze and light rain squalls. 2 p. m., made Fire Island light-house. 6 p. m., breeze from the N. W. Clewed up topsails. 2 a. m., reefed spanker. 6 a. m., passed in by Gay Head

and anchored at Falmouth. Strong N. W. gale So ends this day. No latitude; no longitude.

Dec. 16th.—This day begins with strong N. W. gale. 6 a. m., moderating. Got under way; set all possible sail. Middle part, very light breeze from the S. S. W. Passed Cross rips at 2 p. m. 4 p. m., wind starting to S. E. and thickening up. Went up under North Shore and anchored. Latter part, S. E. gale with snow.

Dec. 17th.—This day begins with S. E. gale and snow. Wind moderating and came in from the N. W. and blew a fresh gale. Gave her 45 fathoms of chain and bent in the hawser for vessel to surge on. 10 p. m., moderating. Pumps attended. So ends this day.

Dec. 18th.—First part of this day fresh breeze from N. W. 2 a. m., moderating. Hove short and made sail. 5 a. m., hove out and proceeded, wind dying out and springing up from the S. W. Passed out over the shoals at 10 a. m., wind increasing to a fresh breeze and snowing. Passed the Highlands at 1 p. m. Wind came in to the west and increased to a strong breeze. Anchored in the roads at 8 p. m. So ends this passage.

Journal Laying at Boston.

Dec. 19th to Dec. 29th, 1883.

Journal Laying at North Weymouth.

Dec. 29th to Jan'y 2d, 1884.

172

Jan. 2nd.—Received on board 35 tons of guano to complete cargo of 750 gross tons, 460 in bags and the remainder in bulk. Finishing loading at 11 a. m. and towed out in the roads and anchored. Calked on hatches and took the boat on deck; heavy rain. Draft of water, 16 ft. 10 aft and 15 ft. 6 forward.

Jan. 3rd.—This day begins with fresh breeze from the S. W., starting to west. At 10 a. m., hove up and went to sea; passed the highland at 6.30 p. m., wind increasing to a fresh gale; reef mainsail and spanker; started out the channel, but, wind starting to S. W., turned back and anchored under Chatham; small anchor, 45 fathoms chain. So ends this day. Pumps well attended.

Journal from Boston Towards Savannah, Ga.

Jan. 4th.—Begins with fresh breeze from the N. W., and fine. Still laying at anchor under Chatham. Middle and latter part, the same. Pumps well attended.

Jan. 5th.—Begins with fine weather. At 4 p. m., got under way, wind starting to north and threatening snow. Went in over the shoals and anchored under north shore at 8 p. m. Pumps attended. So ends this day.

Jan. 6th.—This day begins with cloudy weather and fresh breeze from the north. 4 a. m., N. W. and clear, fresh breeze. At 6 a. m., hove short and set two-reef spanker, whole fore and main sail. Hove out, came out over the shoals, passing the Pollock rip at 11 a. m.; came out the east way. So ends this day of 12 hours to commence sea time. Pumps well attended to.

Jan. 7th.—This day begins with a fresh breeze from the N. W. At 1 p. m., Pollock Rip light-ship bears N. N. W., dist. 5 miles, from which I take my dep't. Set log. At 2 p. m., wind breezing; furled topsails. 3 p. m., furled the spanker, wind steadily increasing. 5 p. m., jibed ship. 8 p. m., wind increasing to a strong gale; two-reefed main and fore sail and furled fly-jib. Middle part, strong N. W. gale; vessel laboring heavily and shipping large quantities of water from all parts; water entering cabin and forecastle, wetting bed-clothes and washing everything movable about. Latter part, moderating somewhat, but still roll heavily and shipping plenty of water. Pumps well attended to, and find vessel making considerable water. So ends this day. Latitude
173 and longitude obtained by dead reckoning.

Jan. 8th.—This day begins with a strong N. W. breeze and very heavy sea running. At 4 p. m., wind moderating; turned reefs out fore and main sails and set flying-jib. At 6 p. m., set fore and main topsails. Mid. part, light air from the S. E.; latter part, strong breeze from the S. E.; two-reefed spanker. Pumps well attended to and vessel making very little water. No latitude; no longitude.

Jan. 9th.—This day begins with a strong S. E. breeze and freshening to a strong gale; two-reefed main and fore sails. At 4 p. m., furled spanker and jib. Middle part, very sharp gale and heavy sea running; vessel laboring heavily and shipping great quantities of water. Pumps carefully attended to and vessel found to be making considerable water. Latter part, wind still increasing; furled foresail and forestaysail; blowing a living gale from the westward. So ends this day. No latitude; no longitude.

Jan. 10th.—This day begins with a strong westerly gale and sea still running very high. At 8 a. m., set two-reefed foresail; set storm-trysail *and hove vessel to, heading about south;* find that the vessel is making water

faster than we can pump it out with both pumps, *the men not being able to work at pumping steadily because of heavy seas sweeping her decks.*

(NOTE.—The words in italics are inserted on margin of log in lead pencil.)

Sounded pumps and find that she has 7 ft. of water in the hole.

(NOTE.—The figure 7 is written over an erasure.)

Cut the boat lashings and got all ready to leave vessel, when found that the cap had washed off the bilge pump hole on the port side; nailed a piece of sheet lead over it and started both pumps agoing; pumped two hours and sound again and find that we are freeing her very rapidly. So ends this day. No latitude; no longitude.

Jan. 11th.—This day begins with a strong westerly gale and very heavy sea; all hands still at the pumps, and find that we are fast freeing her. After pumping steadily for 10 hours freed the vessel. Middle part, moderating, but very bad sea. Pumps attended to every half hour, and find that vessel is leaking about 300 strokes per hour. Latter part, gentle S. W. breeze and fine weather. So ends this day. No latitude; no longitude.

174

Jan. 12th.—This day begins with cloudy weather and fresh breeze from the N. E. Started to run vessel, but, wind increasing to a fresh gale and getting so rough, had to hove her to *again.*

(NOTE.—The word "again" is added in lead pencil to the end of the line.)

Found a hole in the lead in the scupper on main deck; stopped scupper up. Middle part vessel laboring heavily and shipping lots of water; washed door off forecastle and fill- it with water. Latter part, still blowing a fresh gale. Pumps well attended, and find her making about 300 strokes per hour. So ends this day. No latitude; no longitude.

Jan. 13th.—This day begins with a fresh breeze from the N. E. and rainy. Furl- trysail and run her off S. S. E., very bad sea running all the while. Middle part, very strong breeze and irregular sea running. Vessel ships great quantities of water. Latter part, moderating and sea getting more regular. Pumps attended every half hour and vessel making about 300 strokes per hour. Latitude and longitude obtained by observation.

Jan. 14th.—This day begins with fine weather. Light breeze from the N. W. Shook reef out of foresail and set flying-jib. At 4 p. m. shook 1 reef out mainsail. 8 p. m., very moderate and baffling, but finally breezing up from the S. W. Middle part, strong breeze from S. W. 8 a. m., tacked ship and furled flying-jib. Latter part, very strong S. W. wind. Pumps well attended and vessel making about 300 strokes per hour. Latitude and longitude obtained by observation.

Jan. 15th.—This day begins with very strong breeze from the S. W. Two-reefed fore and main sails. Found that the wedges around the mainmast had started up and made a hole in the coating, causing a leak; drove the wedges down solid. Middle part, moderating. Set flying-jib. Latter part, breezing up fresh again. Furled jib. Pumps well attended and vessel making about 300 strokes per hour. 7 a. m., wind starting to west. Tacked ship. So ends this day. Latitude and longitude obtained by observation.

Jan. 16th.—This day begins with a very strong breeze from the west. 8 p. m., moderating; shook 1 reef out fore and main sails. Wind starting to W. N. W., very rough. Middle part, breezing up fresh from the W. N. W. 8 a. m., hauled down the trysail and set two-reefed spanker, the first time for eight days. Latter part, fresh breeze from the W. N. W. Pumps well attended and vessel making about 300 strokes per hour. So ends this day. Latitude and longitude obtained by observation.

175

Jan. 17th.—This day begins with very fresh breeze from S. W. and very heavy sea running; vessel shipping plenty of water. At 2 p. m., wind starting to north, run her off S. S. W.; fresh breeze and heavy sea; vessel rolling badly. 4 p. m., furled the spanker. Middle part, moderating. 7 a. m., set whole mainsail and foresail, two-reef spanker, and topsails. Latter part, gentle breeze from N. E. and rain. Pumps well attended; vessel making about 200 strokes per hour. Latitude and longitude obtained by dead reckoning.

Jan. 18th.—This day begins with gentle breeze from the E. N. E., with light rain. Found a leak in the forward end of poop; drove in a wedge and stopped it. 4 p. m., heavy rain and baffling winds; furled topsails. 6 p. m., took a heavy squall from the N. E.; took in flying-jib and furled spanker. 8 p. m., fresh breeze and threatening weather; reefed mainsail. Middle part, moderating. Shook reef out of mainsail. Lat-

ter part, fine and moderate; pumps well attended; vessel not making quite so much water; wind baffling, from south to northeast. Latitude and longitude obtained by observation and dead reckoning.

Jan. 19th.—This day begins with a calm. 6 p. m., breezing up from E. S. E. Set all light sails. Middle part, start to south and breezing. Furled all light sails. Latter part, fresh breeze from the south. Pumps well attended and find her making about 100 strokes per hour. So ends this day. Latitude obtained by dead reckoning; longitude by observation and dead reckoning.

Jan. 20th.—This day begins with a fresh breeze from S. S. W. Reefed spanker. 4 p. m., still breezing. Reefed fore and main sails and furled flying-jib. Middle part, fresh S. W. gale and very bad sea; vessel laboring heavily and making considerable water. 4 a. m., wind came into N. W. with a squall. Latter part, breezing from the N. W. Pumps well attended to. So ends this day. Latitude and longitude obtained by observation and dead reckoning.

Jan. 21st.—This day begins with fine weather and fresh breeze from W. N. W. 4 p. m., furled flying-jib, and at 6 p. m. put a reef in the mainsail. Middle part, strong breeze and very rough. At 4 a. m., moderating somewhat. Turned reef out of mainsail. 8 a. m., turned reef out of main and fore sails and set flying-jib. Latter part, breezing up again from W. N. W. Furled flying-jib. Pumps well attended and vessel making water—about the usual amount 176 of water. So ends this day. Latitude and longitude obtained by observation and dead reckoning.

Jan. 22nd.—This day begins with light northerly wind and an occasional rain squall. Breezing up fresh. Put two reefs in the spanker. Middle part, fresh N. E. gale; two-reef main and fore sails. Very heavy sea running and vessel laboring heavily and shipping large quantities of water, filling galley and forecastle. Pumps carefully attended all the while, and vessel found to be leaking very badly *and had started waterway seam.*

(The part in italics is written at end of sentence in lead pencil.)

Latter part, moderating. 10 a. m., turned reefs out of fore and main sails and set flying-jib. Observe that when it is moderating and no water on deck that vessel does not make near so much water. So ends this day. Latitude and longitude obtained by observation and dead reckoning.

Jan. 23rd.—This day wind still moderating and sea fast going down. Set all light sails. 8 p. m., moderating and starting to east. Middle part, calm; latter part, light air from the eastward and very fine. Pumps attended, and find that vessel is making very little water comparatively. So ends this day. Latitude and longitude obtained by observation and dead reckoning.

Jan. 24th.—This day begins with a light breeze from the eastward, hauling to S. E. and breezing up fresh. 8 p. m., furled mizzen-topsail and outer jib. Middle part, very strong breeze from S. E. Furled fore and main topsails and two-reefed spanker. Latter part, wind increasing to fresh gale. Two-reefed fore and main sails and furled flying-jib. Very heavy seas running and vessel laboring heavily and making about 300 strokes per hour. Pumps well attended to. So ends this day. Latitude obtained by observation and dead reckoning; longitude by dead reckoning.

Jan. 25th.—This day begins with a fresh S. E. gale and very bad sea. Running in the trough of sea and laboring very hard, and shipping water all over her, from stern to stem. 8 p. m., moderating; set the whole mainsail. Middle part, calm and heavy swell; vessel rolling rails under. Latter part, light northerly winds. Set foresail and fore and main topsails. Pumps well attended. First part, making plenty of
177 water; latter part, not so much. So ends this day. Latitude and longitude obtained by dead reckoning.

Jan. 26th.—This day begins with a light northerly wind and cloudy. 4 p. m., sounded and got 18 fathoms water. At 8 p. m. got 13 fathoms; stood in to 11 fathoms and tacked ship to north. Middle part, cloudy. At 4 a. m., tacked ship in shore. 6 a. m., light-ship bearing west 15 miles, took pilot on board; run down in sight of Tybee light-house and hove to to await the tide. Pumps well attended. So ends this day. No latitude; no longitude.

Jan. 27th.—This day begins with light S. E. wind and clear weather. At 3 p. m., started to run in; ran in and took tow-boat and ran up within a mile of city and anchored with small anchor and 20 fathoms chain. 8 a. m., boat came down and towed up to the dock and moored. So ends this rough and tedious passage. This day contains 36 hours. Pumps attended. No latitude; no longitude.

Journal Laying at Savannah.

Jan'y 28th to Feb'y 11th.

Jan. 28th.—This day fine weather. 10 a. m., took steam-tug and towed further up river and made fast to sch. John Cross. Spliced jibstay.

Jan. 29th.—All this day fine weather. At work all the day on the vessel. Pumps attended to.

Jan. 30th.—Hauled up into berth and commenced to discharge cargo. Crew employed on vessel. Pumps attended to. So ends this day.

Jan. 31st.—At work all day discharging cargo. Crew employed on vessel. Cargo coming out in very good condition. Pumps attended to. So ends this day.

Feb. 2nd.—This day fine weather. At work all day discharging cargo. Crew employed on vessel.

Feb. 3rd.—Fine weather all this day.

Feb. 4th.—All this day at work discharging cargo. Crew at work on vessel. Pumps attended.

Feb. 5th.—All this day fine weather. Finished discharging bulk at 9 a. m. and went to work on the bags. Crew variously employed.

178

Feb. 6th.—All this day fine. All at work discharging cargo; find the bags to be in very bad condition; worked both hatches; discharged 1,400 bags.

Feb. 7th.—Still at work discharging and making very little progress; discharged 865 bags.

Feb. 8th.—Still at work discharging. Crew at work in the hold.

Feb. 9th.—Finished discharging at 1 p. m. and cleaned out the hold.

Feb. 10th.—Fine weather all this day.

Feb. 11th.—Fine weather. Took steam-tug J. W. Lyn at 1 p. m. and started for Bull river, arriving at 10.30 p. m; anchored with starboard anchor and 20 fathoms chain.

Journal Laying at Bull River (Loading Rock).

Feb'y 12th to 23rd.

On margin, under dates Feb. 12 to Feb. 20th, both inclusive, are the quantities received daily, aggregating 745 tons. Draft of water, 16—6 aft, 15 fore.

Journal from Bull River Towards New York.

Feb. 24th.—All this day strong breeze from the east. Still laying at anchor. Pumps attended.

Feb. 25th.—This day begins with fresh N. E. wind and rainy. Middle part, clearing and starting to north; latter part, light breeze from the west.

Feb. 26th.—Begins with fine weather and gentle — from W. N. W. At 5 a. m., got under way and proceeded to sea, discharging pilot at 8 a. m., St. Helena bearing W. ½ N., dist. 6 miles, from which I take dep't. Latter part, fine weather; wind S. W. Pumps attended. This day contains 12 hours. Latitude and longitude obtained by dead reckoning.

Feb. 27th.—This day begins with fine weather and fresh S. W. breeze. Middle part, moderating and start to N. W. Sighted 1 sch. and 1 bark bound south. Latter part, light air from the north and finally dying out to a calm. Pumps attended. So ends this day. Lati-
179 tude and longitude obtained by observation and dead reckoning.

Feb. 28th.—First part of this day, breezing from the S. W. 8 p. m., furled mizzen-topsail and outer jib. 10 p. m., breezing up fresh; furled all light sails and two-reefed spanker. Middle part, wind increasing to a fresh gale; two-reefed mainsail and foresail and furled spanker. 7.30 a. m., jibed ship; wind hauling to N. W. and still increasing; heavy sea running and the vessel laboring heavily; furled foresail and jib. Latter part, moderating somewhat. Pumps attended. So ends this day. Latitude and longitude obtained by dead reckoning.

Feb. 29th.—All this 24 hours fresh N. W. gale and very bad sea running. Vessel laboring heavily and shipping great quantities of water. Pumps well attended to, and find vessel to be making about 100 strokes per hour. So ends this day. No latitude; longitude obtained by observation.

March 1st.—This day begins with fresh N. W. gale and very bad sea, causing vessel to labor heavily. Shifted chain locker. Middle part, moderating somewhat an- sea getting more regular. 8 a. m., jibed ship and set all lower sails. Latter part, calm. Pumps attended *tp*. So ends this day. Latitude and longitude obtained by observation.

March 2nd.—This day begins with a calm. 4 p. m., light breeze from eastward. Middle part, gentle breeze from S. E. and cloudy. 8 a. m., fresh breeze from the east and snowing; furled all light sails. Latter part, wind fresh from N. E., with light snow; sounded and got 18 fathoms of water. Pumps attended to. So ends this day. No latitude; no longitude.

March 3rd.—This day begins with fresh breeze from the N. E.; reefed fore and main sails. Middle part, calm; turned reefs out of fore and main; made Absecom light. Latter part, fresh breeze from N. W. and heavy snow squalls. Pumps attended to. So ends this day. No latitude; no longitude.

March 4th.—Begins with heavy squall from N. W.; snow falling fast; moderating; breezing again from W. N. W. Passed Barnegat at 7 p. m.; got up to Sandy Hook light-ship at 4 a. m.; at 5 a. m. took tow. Wind heavy from N. W. Parted hawser and anchored; 9 a. m. started again and towed to city. So ends this passage. Anchored at Staten island.

180 *Journal Laying at Elizabethport.*

March 5th to March 19th, 1884.

Six bills of lading were put in evidence by both parties. (Witness produces papers, which are marked Exhibits B 2, C, D, E, F, and G.)

Libellant's Exhibit B 2 and Claimants' Exhibit 1 is one of the bills of lading and is as follows:

LIBELLANT'S EXHIBIT B 2.

Shipped in good order and condition by Bradley Fertilizer Co. on board the good schooner called the Edwin I. Morrison, whereof Lavender is master for this present voyage, now lying in the port of Boston, and bound for Savannah, Ga., to say:

Marks and numbers. Murphree, Hill & Co., Troy, Ala., care Georgia Central R. R., Savannah, Ga.

To be discharged at any wharf consignee directs. If more than one wharf is used, consignee pays extra towage.

— bbls. superphosphate of lime.
— bags " "
— bbls. sea-fowl guano.
1,000 bags sea-fowl guano, 200 lbs. ea.
— bbls. bone.
— bbls. —.
— bags —.
— tons.

Twelve empty sacks for vessel's use, being marked and numbered as in the margin, and are to be delivered in like good order and condition, at the aforesaid port of Savannah, Ga. (the danger of the seas only excepted), unto Georgia Central R. R. or to assigns, he or they paying freight for the said goods (1.50) one dollar fifty cents per ton, 2,240 lbs.

In witness whereof the master of the said vessel hath affirmed to four bills of lading, all of this tenor and date, one of which being accomplished the others to stand void.

Dated at Boston, Jan. 2nd, 1884.

S. S. LAVENDER.

The other bills of lading are the same in form and contained the following, viz:

770,000 lbs. dissolved bone in bulk, $343\frac{168}{224}\frac{80}{0}$ tons.
C2 38 bales empty bags, 100 ea.—3,800 bags.
181 D3 999 bags Farmers' Favorite, 200 lbs. each.

E4 1,000 bags Carolina fertilizer, 200 "
F5 1,000 " superphospate of lime, 200 lbs. each.
G6 500 " nitrate guano, 200 lbs. each.
100 " nitrate soda, 200 lbs. each.
2 bales empty nitrate sacks, 64 each—128 sacks.

LIBELLANT'S EXHIBIT "I."

Declaration and protest, omitting the formal parts, was as follows:

UNITED STATES OF AMERICA,
State of Georgia, City of Savannah.

On the twenty-seventh day of January, in the year of our Lord one thousand eight hundred and eighty-four, before me, H. S. Johnson, a notary public in and for the county of Chatham, in the State of Georgia, in the city of Savannah, personally appeared S. S. Lavender, master of the schooner Edwin I. Morrison, of the bu-then of about 507 tons, and noted with me in due form of law, his protest for the uses and purposes hereinafter mentioned.

And now, on this day, to wit, the sixth day of February, in the year aforesaid, before me, the said notary, again comes the said S. S. Lavender, master, and requires me to extend his said protest, and together with him come and appear Geo. M. Cook, mate, and Dan. Golden, seaman, all belonging to the aforesaid schooner, all of whom,
being by me severally duly and solemnly sworn, voluntarily
182 and freely depose and say that the aforesaid S. S. Lavender,
master; Geo. M. Cook, mate, and Dan. Golden, seaman, with the rest of the crew of the aforesaid schooner, sailed from Boston on the fourth day of January, in the year of our Lord one thousand eight hundred and eighty-four, the aforesaid schooner being bound on a voyage from Weymouth via Boston to Savannah, Ga., and being loaded with a cargo of guano in bags and bulk.

That the aforesaid schooner at the time of departure from Boston, as aforesaid, was sound, tight, and staunch, and properly fitted, equipped, and manned for the aforesaid voyage; that the aforesaid cargo was well and sufficiently stored and her hatches properly closed and secured.

Saturday, Jan'y 5th:

Weather threatening, came to anchor under Chatham. Sunday, at 6 a. m., came out over shoals; passed Pollock Rip light-ship at 11 a. m., and from this take our sea time. Pumps duly attended.

Monday, Jan'y 7th:

This day begins with a fresh breeze from N. W. 1 p. m., Pollock Rip light bore W. N. W., dist. 5 miles. At 2 p. m., wind freshening, furled topsails. 3 p. m., furled spanker, wind steadily increasing. 5 p. m., jibed ship. 8 p. m., wind blowing a strong gale; reefed fore & main sail & furled flying-jib; vessel laboring heavily

& shipping large quantities of water, flooding cabin & forecastle & washing everything about decks. Latter part, moderated some, but sea still heavy & vessel making some water. Pumps carefully attended.

Tuesday, 8th, & Wednesday, 9th :

Nothing unusual occurring. Pumps well attended to & latter part of the time blowing a strong gale from westward.

Thursday, Jan'y 10:

Blowing strong gale and sea very high. 8 a. m., set two-reefed foresail and storm-trysail & hove to, heading about S; found vessel making water faster than we could free her; men not able to stand at pumps steadily because of the heavy seas sweeping decks. On sounding pumps found about 7 feet water in hold, on which we cut boat lashings and got ready to leave her, when 183 we found cap gone off from bilge pump hole on the port side; nailed a piece of sheet lead over hole & started both pumps. After working two hours found — were gaining on the leak rapidly. So ends this day.

Friday, January 11th :

Blowing a heavy gale and all hands pumping. After ten hours' hard working got the vessel clear of water. Latter part, gentle breeze S. W.; so ending.

Saturday, January 12th :

Begins with cloudy weather and fresh breeze N. E. Started to run her, but, wind increasing to gale, had to heave to again. Found a hole in lead round main-deck scupper and stopped it. Middle part of day, vessel laboring heavily and shipping great quantity of water; washed away forecastle door and filled house with water. Latter part, same. Pumps attended and vessel making about three hundred strokes per hour. So ends this day.

Sunday, 13, and Monday, 14 :

Weather more moderate and sea going down until latter part of this time, when it was blowing again strong from S. W. Pumps attended every half hour, and vessel making about 300 strokes per hour.

Tuesday, 15 January :

Blowing strongly from S. W.; two-reefed fore and main sail-; found wedging round mainmast had worked up and made hole in mast coating, causing a leak; drove the wedges down solid. Latter part of day, more moderate. Pumps well attended.

Wednes., 16, and Thursday, 17 :

First day, nothing unusual; latter day, fresh breeze and very heavy sea, shipping great quantities of water. Pumps well attended, and

vessel still making about 300 strokes hourly. Ends with light breeze N. E. and rain.

Friday, 18th:

Begins with gentle breeze E. N. E. and light rain. Found a leak forward end of poop and stopped it. Six p. m., took a heavy squall from N. E. Middle part, more moderate; latter part, fine weather and vessel making less water; baffling winds, varying from S. to N.

Saturday, 19, and Sunday, 20:

Winds in early part of this time light; latter part, blowing hard from S. W., and vessel again laboring heavily and making considerable water, ending with strong breeze W. N. W., and pumps all the time looked to.

Monday, 21 January:

This day variable weather; winds generally W. N. W., part of time blowing hard. Pumps duly attended.

184 Tuesday, 22 January:

Begins with light wind from N., and occasional rain squall. Middle part, fresh; gale from N. E.; noted that in moderate weather, and when shipping no water on deck, vessel leaks much less. Latter part of this day had very heavy sea, and vessel laboring heavily. Not able to work to good advantage at pumps on account of seas sweeping decks, vessel leaking badly; found had started seams of water-way. So ends this day.

Wednesday, 23; Thursday, 24 January:

Weather moderate until latter portion, when wind freshened to gale from S. E., running under closed-reefed fore & main sail, with very heavy sea, vessel laboring heavily, and still leaking about three hundred strokes per hour.

Friday, 25 January:

Begins with fresh S. E. gale & a very bad sea; running in the trough, laboring heavily, and shipping large quantoty of water on deck; vessel still leaking and pumps regularly attended.

Saturday, 26 January:

Comes in with light N. winds. 4 p. m., sounded in 18 fathoms; 8 p. m., 13 fathoms. 6 a. m., Martin's Industry light bore west fifteen miles; took pilot and run down in sight of Tybee & hove to, waiting for the tide.

Sunday, 27 Jan'y:

3 p. m., ran in and took tug up river, anchoring in the stream. 8 a. m., came up to city and went into dock for disch'g. So ends this rough and stirring voyage, pumps being always looked to.

And the said deponents further swear that during the said voyage they, together with the rest of the crew on board, used their utmost endeavors to preserve the said schooner and her cargo, tackle, and apparel from damage or injury, and that any loss, damage, or injury which has arisen or accrued or that may arise or be sustained in any way or manner whatever is solely owing to the accidents and difficulties herein set forth and declared and not to any negligence, want of skill, vigilance, or exertion on the part of the
185 deponents or any of the officers or men of the said schooner "Edwin I. Morrison."

(Signed) MASTER, STEPHEN S. LAVENDER.
" MATE, GEORGE M. COOK.
" SEAMAN, DAN. GOLDEN.

Wherefore the said Stephen S. Lavender, master as aforesaid, has requested me to protest, and I, the said notary, at such his request, have protested, and by these presents do publicly and solemnly protest, against all and every person and persons whom it doth, shall, or may concern, and against all and singular the accidents, casualties, and circumstances already set forth in the foregoing declaration on oath for all manner of losses, costs, damages, charges, expenses, and injuries whatsoever which in said schooner and her cargo on board and the freight by her earned or to be earned, or either of them or any part thereof, have already sustained or may sustain hereafter by reason or means of the foregoing premises.

In testimony whereof I have hereunto set my hand and affixed my notarial seal, in the city of Savannah as aforesaid, on the sixth day of February, in the year of our Lord one thousand eight hundred and eighty-four.

H. S. JOHNSON,
[L. S.] *Notary Public, C. C.*

Testimony in Circuit Court on Appeal on the Part of Claimants and Appellants.

Deposition of R. G. F. Candage.

I shall be sixty-three next July. I am marine surveyor—a surveyor for the Veritas and Record—Bureau Veritas—a French classification of vessels. The record is an American classification of vessels. My duties in connection with those are the exami-
186 nation and passing of judgment upon the seaworthiness and general condition of the vessels and issuing certificates of character of class. I have been connected with the Record twenty years, and seven, I think, with the Veritas. Prior to that my business was sailor and master. I have been master mariner from 1850–1867. In January, 1868, my connection with the Record began. Since that time my business has been exclusively examining vessels with a view to ascertaining their character. I would amend that by saying I have been employed for ten years by the board of underwriters here to make reports to them of the character

of vessels; from 1868 to 1878, if my memory serves me right. I was called upon to survey all vessels, large and small, steamers and sailing. I have had occasion to examine, some years might not be more than a hundred and other years three or four hundred, not for class, but examination for underwriters as to their seaworthiness for a voyage. Those would not be classed; they were examined simply to determine their seaworthiness with a view to obtaining insurance for a voyage. I know the Morrison. I see her in port occasionally now. It is my recollection she had bilge pump plates. It was formerly much more usual than I think it is at the present time for sailing vessels to have plates. I think at the present time the bilge pumps are more often put in amidships and run out from the centre of the bottom of the vessel into the bilge, the pipe; but formerly that was the method of putting in bilge pumps. I mean putting them in the way, the water-ways, of vessels. It was quite usual to have them in the water-ways, and is yet. There are vessels to-day that have them, as far as my remembrance and knowledge go.

187 I do not remember the question of seaworthiness of vessels with those bilge pump plates in the water-ways arising nowadays except in this present case; so that in my examination of vessels to-day, or more particularly in 1884, I would not consider it any detriment to a vessel to have bilge pump plates in her water-ways. In a vessel such as the Morrison these plates are usually placed between the top stanchions down through the plank sheer (or covering board), another name for the same thing. They are placed in the ways and the opening runs down through the covering board to the bottom of the vessel, usually abreast or a little abaft of the mainmast or the centre of the vessel. These plates are regarded as permanent fixtures, not requiring to be removed for examination. There is no special examination that I ever give them. I have sometimes examined them. (They are screwed in.) I have sometimes unscrewed them, and sometimes, if there were any appearance of defects, I have examined them more carefully; but usually the eye tells if it is started or even moved. I mean I unscrewed the cap. I never in the course of my experience remember unscrewing the plate; never thought it necessary. To remove the plate from time to time by unscrewing them for the purpose of examination would have a tendency to weaken the fastening. The plates are usually confined to the plank sheer with screws—brass screws—and the more those screws be loosened and reset the more they will weaken the solidity of the fastening. If the plate of the Morrison had been there for a series of years—say ten or eleven—and never used and never removed, and had been painted over from time to time with the ways, no examination at all of that plate was necessary to determine the seaworthiness of the vessel other than by the eye. I

188 do not carry the port plate of the Morrison distinctly in my mind; but if it had been other than ordinary appearance and construction I think I should have remembered it. I should say, as a matter of opinion, there would be no gradual weakening of the fastenings of the plate, supposing them never to have been removed from the time they were put on.

Q. Captain, supposing the Morrison to have sailed from North Weymouth in January, 1884, with a cargo of guano, bound for Savannah; that during the voyage she met with severe weather and part of the time the decks were flooded, and it was discovered that the bilge pump plate on the port side was gone. This bilge pump plate was located near the bulkhead of the poop deck, say about two feet distant, and her port was opposite the place in the ways where the plate was located. The port was open; articles were floating about the decks, consistong of such natural breakage as would arise from exposure of the vessel to a storm of this kind; the cover of the coal box, for instance, or parts of the door of the galley; that the vessel had a list to port. After the plate was gone it was found to have carried away with it all the screws. The wood in which the screws were fastened was sound. To what, in your judgment, was the loss of that bilge pump plate attributable?

A. In my opinion, to the fact that some hard substance had been dashed against it by the force of the waves and the rolling of the vessel. By waves I mean the water on deck or that which might come over the vessel and find its way to the lee side with great force, taking anything in its way with it. I should have looked for marks in the vicinity of the place where the plate was, but if no marks had been
189 there I don't think it would have changed my opinion as to — something more solid than water had struck the plate and carried it away. I don't think that the force of water could have ripped that out and carried it away alone. If some object had struck the plate it would not necessarily have struck anything else in the vicinity. I have seen a great many storms at sea. I have made nine voyages around Cape Horn and other voyages across the Atlantic. Water taken in a vessel must find an outlet, of course, or else it will burst something away. In escaping from a vessel it escapes with great force and carries anything with it with equal force. It will fetch up with tremendous force, and anything has got to be very solid to stand it—that is, such as bulwarks. The power is almost inconceivable by one who has not witnessed it. I would not have been very much surprised if I had not found the object that knocked that plate out, for the part was between the two very stanchions between which this pump was located, and any object that would have carried away that plate would have gone overboard with the same force of the wave that carried through and overboard through the port-hole, provided it had been small enough to go through. The loss of spars and sails would not be necessary to prove that she had encountered severe weather—it would corroborate it. If there had been severe weather and no loss of spars and sails, it would be evidence of good seamanship in handling the vessel. Prior to 1884, I last saw the Morrison in August, 1882, as near as I can fix it in my mind. She was then on the dock at East Boston. I don't think at the time my attention was called to her bilge pump plates in any way, although in my general survey of the vessel it came under my eye. I don't think I ever examined
190 them by having them removed. I have looked at them carefully, because I think I passed that vessel once; I would

be sure to do it then, and more than once. I think I have seen her to be on board of her since 1884, but I have not the date with me to identify that.

Q. Was your attention called to her bilge pump plates since 1884?

A. No, sir; not that I remember. I have not examined her for the purpose of testifying here in any way. The bilge pump plates are usually placed near the midships of a vessel, in the plank sheer. The part that is put through the side of the vessel below that deck does have an iron frame. There is no frame-work placed around those in the bulwarks. I don't think I ever knew of a bilge pump plate being carried away before this. I have known of decayed water-ways; have had new water-ways put in sometime-, and sometimes a part where there is decay. I think I have put in a part where the water-way was one piece—that is, where the covering board and plank sheer were all in one. I think I have done so where there was decay, but more often when they were split.

Q. And have you in any instances had such pieces put in where the bilge pump plates were located that you can recollect?

A. I think so. It would be very strange if I hadn't. I remember the plate on the Morrison, both from a distinct recollection of it and from what I have seen on other vessels—the usual custom. Since hearing of the loss of the plate on the Morrison I don't think I have changed my mode of examination at all. I have examined them and looked at them on vessels that had them. By taking hold of the cap you could judge of the firmness of the plate. If the cap is screwed down solid and painted over there is some resistance to the unscrewing of it. To the best of my remembrance
191 the bilge pump plate on her starboard side was located just opposite the other, and they were very nearly alike. When I was on the Morrison my remembrance is that the hole was plugged up, I think with a wooden plug. My attention was not attracted to it particularly. I never made a survey or inspection devoted to that particular*ly* cap. I don't remember, however, of any water-way having been put in in consequence of decay in that particular part of the water-way where the bilge pump plate had been located. I don't think the water-way's being so put in had anything to do with the fact of the bilge pump plate being there. I had unscrewed the cap on some occasions where my eye detected, perhaps, what appeared to be a defect, and it was unscrewed for the purpose of seeing whether it could be verified.

Q. So that in those cases your attention was called to it by some outside appearance?

A. Yes, sir; always, I think, where that had been done. I don't pretend that my memory should be exact in all cases, although in the majority of vessels you will find that the bilge pump plates are opposite each other. I would not deem any examination of the bilge pump plate necessary other than such examination that I would give to the permanent part of the vessel. I don't think I should be more particular than I should be with the spars. The unscrewing of the cap would not be very much advantage; it might to a small

extent, in giving you an opportunity to inspect the condition of the wood inside the opening; you could determine its condition slightly better, perhaps, than that of the painted wood outside; and if in unscrewing I found motion in the plate itself I should suspect there was something wrong in the holding of the screws. Before
192 starting on a voyage I think it would be advisable for the officers to look to these plates as well as the pumps or any other permanent parts of the vessel.

Q. Such an examination, in your judgment, could be made with the eye?

A. That is what I should rely on in my case. Inspecting such a vessel as the "Morrison," I should spend perhaps an hour or a half an hour. If I went below it would take me a great deal longer than above decks—I should say would take on the average half an hour. I don't pretend to see that every scupper is tight. I cast my eye over the stays and lanyards, because that is an important thing, but I don't turn them over and look into them. We have to do a great deal by the eye; three-fourths is made by examination with the eye without any other test than that which the eye gives. If there is water in a vessel's hold, and she is rolling in a gale of wind, 18 inches of water would be increased about 50 % in the bilge. With a small quantity of water on the floor of the Morrison and *damage* of nine inches, I think if she were rolling there would be damage to the cargo in the bilges, but not on the floor of the amidships of the vessel. I should think there would be capillary attraction in guano. Where a staunch vessel in good order has been subjected to heavy weather, when carring a heavy cargo of guano, for instance, and takes in some water through her seams, it depends upon the discretion of the person in charge whether it is necessary to make repairs or not. A good staunch vessel recovers to some extent when relieved of the straining and cargo and in port for a few days at rest. An iron vessel does not shake back into place as a wooden one does. The settling back will not prevent the same thing from occurring under the same circumstances. Rock phosphate is considered to be much more trying than guano,
193 though both are dead-weight cargoes; no life in them. A vessel loaded with 750 or 756 tons of guano would not be strained by 7 feet of water in her hold. That additional water would carry her deeper in the water and make her much less buoyant, but I don't know that it would strain her, except the seas would tumble on her easier and would strain her more on top from that cause. When I said that a vessel rolling with 18 inches of water in her well-hole would be likely to wet her cargo in the bilges I assumed that the dunnage in the bilges would be nearly double the depth of what it would be amidships; it should be. The uneven motion of the vessel is what carries up the water 50 per cent.

Q. Is the motion as rapid and continuous when lying to as when under way?

A. When lying to, the motion is a little different. I should say the rolling would be as great or greater when lying to than she does with canvas on her, which steadies her.

And thereafter the said court made and signed the final decree in this cause.

E. HENRY LACOMBE.

194 [Endorsed:] U. S. circuit court, southern district of New York. Bradley Fertilizer Company, lib'ts & app'ts, *vs.* Sch'r "Edwin I. Morrison," her tackle, &c.—Stephen S. Lavender *et al.*, cl'm'ts & appellees. Bill of exceptions. George A. Black, proctor for lib'ts, 71 Wall street, New York city. To —— ——: Due service of a copy of the within — is hereby admitted. Dated ——, 18— —— ——. U. S. circuit court. Filed Aug. 13, 1890. John A. Shields, clerk.

Please take notice that the —, of which the within is a copy, was this day — in the office of the clerk of this court.
Dated ——, 18—.

Yours, &c.,

GEORGE A. BLACK,
— *for* —, *71 Wall Street, New York.*

To —— ——.

195 *Opinion.*

BROWN, *J.*:

The libel in this case was filed against the schooner "Edwin I. Morrison," to recover for the damage done to a cargo of guano by sea water taken aboard on the 10th day of January, 1884, on her voyage from Boston to Savannah. The schooner sailed on the 5th of January, and, according to her log, on the afternoon of the 9th of January, met a very strong gale and heavy sea, and shipped great quantities of water. The 10th opened with a strong westerly gale, sea running very high. "At 8 a. m.," as the log continues, "set two reefs, foresail and *storm-trysail and hove vessel to, heading about south*: found that the vessel is making water faster than we can pump her out with both pumps, *the men not being able to work at pumping steadily because of heavy seas sweeping her decks.* Sounded pumps and found that she has *seven* feet of water in the hold. Cut the boat lashings and got already to leave vessel, when found that the cap had washed off the bilge pump hole on the port side. Nailed a piece of sheet lead over it and started both pumps agoing.
196 Pumped two hours and sounded again, and found that we are freeing her very rapidly." The words above quoted in italics have been added to the log at some time since the original entry. The figure 7 is written over an erasure. The damage sued for was occasioned by the flooding of the hold.

The evidence leaves no doubt that most of the water was taken in through the bilge pump hole referred to in the above extract from the log. This was a hole in the port side in the water-ways, a short distance only in front of the poop, and ran down through the water-way between the ceiling and the skin of the ship. There was a similar hole on the starboard side. They were placed there in the construction of the ship, for the purpose of running a hose down

in the bilges, so as to pump out the water more thoroughly in case of a light cargo and much rolling. The hole was from three to four inches in diameter; and was covered by a brass plate about four inches square, countersunk into the timber, through which was a hole, covered by a brass cap, which screwed into the plate. The plate was fastened into the water-ways by screws. Such bilge pump holes are not unusual in vessels constructed in some localities, and seldom have any accidents arisen from them. The mode of covering them above described was deemed perfectly secure. Such caps usually project a little above the surface of the water-way, the upper edge of the cap being bevelled off, so as to leave usually not more than an eighth of an inch of perpendicular surface. The only question in this case is whether, considering all the circumstances, any negligence is shown either in the handling of the ship, or in the sufficiency of her equipment as a seaworthy vessel, as respects the proper security of this port cap and plate.

The schooner was built some eleven years previous. These holes had never been used. They were dangerous, unless the caps and plates to cover them were kept perfectly tight and secure.
197 The obligation to keep watch of their condition was as stringent as the danger from weakness in them was extreme. Yet there is no satisfactory evidence that there had been more than a casual examination of them since the schooner was built. The evidence shows that up to about half past four a. m. of the 10th, the schooner had made no more water than was speedily pumped out in the ordinary handling of the pumps every two hours. Upon renewing the pumping at half past four, and not obtaining a suck as soon as usual, the captain, at five a. m., sounded, and found eighteen inches of water in the hold. The schooner at that time, according to the captain's testimony, was on the port tack, lying to. In order to man the pumps better, she was then put before the wind, with the wind on the starboard quarter, which gave her a list to port of about two streaks. Notwithstanding the constant pumping, she continued settling till nine o'clock, when seven feet of water was found in the hold. The captain supposed she had sprung a leak, probably through her bow ports. About eleven o'clock they wore ship, which presently brought her port side out of water; when, through the gurgling in the bilge pump hole, the second mate discovered the opening, as the master and crew were on the point of abandoning her. The opening was soon covered with sheet lead; and shortly after the ship was speedily lightened by the use of the pumps.

The second mate, who took charge of the watch at half past four, says that she was then on the starboard tack, but he also says her booms were on the starboard side, and that the port side was lowest in the water, and that it was eight o'clock when they kept her off on the same tack.

The theory of the defence is that the plate and cap were perfectly tight; but that, through the many seas taken aboard, and the washing about of many articles upon the deck, particularly of the
198 heavy covers of the chain lockers that had got adrift, the

bilge plate and cover, though perfectly sound and tight in their setting, were knocked off by violence or some accidental blow of the floating articles. For the libellants it is urged that this explanation is purely hypothetical, and not entitled to be accepted as a discharge of the ship's presumptive liability.

I do not find any reason to charge the ship with any defect in her original construction by reason of having the pilge pump holes. The fact that they were quite commonly used in the construction of such vessels and deemed safe; that this schooner had been in constant use during all weathers for some eleven years without any previous accident from them; that the existence of these holes was obvious upon any careful inspection or survey of the schooner, and that no objection has ever been made to them, are a sufficient answer to any charge of unseaworthiness from the mere fact of having such holes. It is, doubtless, possible that if one of the heavy chain-locker covers had been swept violently across the deck in an exactly level position, and with a sharp and hard edge had hit the upright surface of the cap, that might have torn off the cap and plate, and account for this accident. The probabilities of any such contact of a sharp and solid edge of one of these covers in the exact position to do this are exceedingly small. The cap and plate were upon the water-ways and a number of inches above the deck. The second mate says the covers were "water-logged." They would hardly seem capable of inflicting any blow that would not slide off and over the bevelled edge of the cap, if the cap and plate were securely fastened. It seems incredible, moreover, that any such blow could have been given that would not have left its marks upon the stanchions and bulwarks on the port side, which were within a few inches of the plate; yet no such marks appear, nor was anything broken or carried away in that vicinity except the cap and plate, although on the starboard side the bulwarks were, in
199 some places, carried away. There is, in fact, no evidence of any such violent blow in the region of the cap and plate as is assumed by the claimant. Several experts, moreover, express the opinion that if the plate had been carried away by such a blow, the wood, if sound, would have retained the screws and their heads would have been broken off, although other experts express a contrary opinion. The screws, however, were carried away with the plate. For the claimants one witness testified that the holes of the screws were sound, and not decayed or blackened; and the fact that the wood held the sheet lead afterwards nailed upon it is urged as evidence that the wood was sound. Other witnesses also testify to the fact that it was sound.

The question is entirely one of probability as to the cause of the plate's coming off. If there was evidence that the plate had been knocked off by some violent blow from objects washed by the seas across the deck, it would still be incumbent upon the claimants to satisfy the court that the cap and plate were so made and so fastened as not to be liable to be knocked off by any ordinary collisions of that kind. The claimant did not introduce any proof by exact measurements to show what was the height of the cap above the

water-ways, or the height of the perpendicular edge up to the beveiling; nor was the duplicate cap on the starboard side produced. Only some models and samples of what is usual were exhibited. From the evidence it must be inferred that for several years past, at least, if not ever since the schooner was finished, the cap had not been unscrewed, nor the fastenings of the plate tested.

The schooner on this voyage was also loaded deep, as the evidence clearly shows. The second mate so states explicitly. She may not have been loaded so deep as to be unseaworthy in this respect, but she was loaded deeper than is usual or prudent for the winter
200 season. She was a staunch vessel, and her behavior and recovery, notwithstanding she was on the verge of sinking, are good evidence as to her generally staunch character and good handling. But being deeply loaded and sailing down the coast in the winter season, it was to be expected that she would encounter storms, and that her decks would all the more, from her deep loading, be swept by heavy seas. Before starting out thus deeply loaded she was bound to have seen that the plates and caps in her water-ways were all fast and secure against ordinary accidents or collisions that might come from loose objects swept by the seas across her decks.

The testimony on behalf of the vessel at the trial I must deem somewhat exaggerated, both as to the severity of the gales she met, and as to the amount of water on deck prior to the time when the leak became serious. After the leak increased rapidly she necessarily settled gradually lower in the water, and consequently was much more swept by the seas. It is noticeable that although the log says that the vessel on the 9th was laboring heavily and shipped great quantities of water, this is not stated to have been the case on the 10th until after 8 a. m., several hours after this heavy leak began, although it is said the sea was running very high. The captain's statement, moreover, that the vessel was on the port tack through the night would not make very probable a list to port before the cap was knocked off, and before the water got into the hold. His testimony in the various places where this subject is spoken of leaves it doubtful whether she had any list to port before she was headed off to run free, after eighteen inches of water had been discovered at five o'clock, and the cap must have got off before that time. The second mate testifies that all the places where the bulwarks were carried away were "on the starboard side, that is, the weather side." He says that about five o'clock he picked up one of the chain-locker covers close to the poop, where it had been
201 washed within about two feet of the port cap; but as this was, as he said, a little after daylight, it must have been nearer six o'clock than five. This cover, he says, was of wood and water-logged. If so, its edges would scarcely be sufficiently hard to knock off a plate properly secured, having only from one to two-eights of an inch of perpendicular surface.

There can scarcely be any doubt that the cap and plate were carried off through the action of the sea and the things washed about the deck. But the evidence indicates pretty clearly that this was

done before the vessel was subjected to any extraordinary conditions aside from her deep loading: and it is certain that there was no indication of any special violence about the wood-work, in that quarter, such as would be necessary to knock away such a cap if properly secured. I think that the only reasonable conclusion is that after eleven years' service the fastenings had become weak, and that the plate was carried away from that cause, and not from any extraordinary contingencies. The fact that the starboard plate was still secure does not prove that the port plate might not have become loose or weak. There had been no careful inspection for a long time to make sure of its safety and strength. Its insufficiency, though latent, was legally at the risk of the vessel.

Work *vs.* Leathers, 97 U. S., 379.
Wilson *vs.* Griswold, 9 Blatch., 267.
Hubert *vs.* Recknagel, 13 Fed. Rep., 912.
The Lillie Hamilton, 18 Fed. Rep., 327.

In the case of the Titania (19 Fed. Rep., 101) there was no long lapse of time during which the original fastenings might naturally have become weak. The fastening and the careful inspection were recent. Here the contrary is the fact.

To be ascribed to a peril of the seas, the burden of proof is upon the vessel to show that the plate and cap were probably car-
202 ried away by extraordinary contingencies not reasonably to be anticipated. The evidence does not, in my judgment, disclose any such extraordinary condition of things at the early hour of 4.30 to 5 a. m. of the 10th, considering the time of the year and the depth of loading under which the vessel set sail.

It does not appear that she lost a spar or a bit of canvass, although there was doubtless a long continuation of heavy weather. The improbability that any of the supposed causes should have carried away the plate, if it had been properly secured at the time of sailing, without doing any other damage to the bulwarks or stanchions adjacent, I deem so great, that I feel constrained to ascribe the cause, in the absence of proof of any thorough trial or inspection of the plate before the schooner sailed, to the gradual weakening of the fastenings during the eleven years since the vessel was built.

Fully appreciating the uncertainty and embarrassment that attend the case, I must allow judgment for the libellant, and direct an order of reference to compute the damages.

March 30, 1886.

203 U. S. District Court, Southern District of New York.

The "Edwin I. Morrison."

George A. Black, for libellant.
Wilcox, Adams & Macklin, for claimants.

BROWN, *J.:*

On the exceptions to the commissioner's report and the motion for a rehearing, I have considered all the proofs and the additional

depositions submitted. Upon one point I am satisfied that the evidence of the second mate was misunderstood; namely, in reference to the schooner's being loaded deeper than usual. I think that passage refers to a previous voyage. With this element eliminated, however, my opinion is not changed as to the probable cause of the cap plate's giving way. The suggestion that the plate may have been knocked off by the locker cover is purely hypothetical.
204 If it had been knocked off in that way, no doubt the vessel could not be expected to produce direct proof of it by eye-witnesses; but some marks of violence adjacent should have been expected to attend such a cause, and none such were observed; while the situation of the plate made the probability of its being knocked off in that way very small. This is, however, but a repetition of what was stated in the previous decision.

The commissioner has charged the vessel for the difference between the market value of the cargo delivered sound and its value delivered in its damaged condition.

This is the correct rule of damage, and the evidence warrants his finding in this respect. He has charged the vessel, however, with the entire damage to the bags that were in the hold. I cannot doubt upon the evidence, however, that from the considerable water that was taken aboard and went down by the mast and in other ways the lower part of the cargo in the hold must have been damaged to some extent by water before the bilge plate was knocked off. Any such damage is chargeable to sea perils, for which the vessel is not answerable. Where it is certain that a part of the damage has been thus caused, and the facts and circumstances afford the means of a tolerable approach to an apportionment, the whole damage should not be imposed upon the ship, because the exact amount cannot be determined by direct and positive proof. The Shand, 16 Fed Rep., 570, 574.

In this case, it is pretty certain from the evidence that the bilge plate was carried away about the time that 18 inches of water was found by sounding in the wells. This depth of water as I understand, from the evidence, must have come into contact with the lower part of the cargo in the hold. Making allowance for the depth of the well below the bottom of the hold, as well as for the usual dunnage, and considering the effect of the water in the bottom of the hold by the rolling of the vessel in a heavy sea, with the upward soaking of water in the guano from capillary attraction,
205 and that the greatest depth of water shown by subsequent soundings was only five or six feet additional, I cannot doubt that at least ten per cent. of the damage to the cargo in the hold arose from sea water taken in otherwise than by the bilge-pump hole on the port side. Making this correction in favor of the claimant, amounting to $1,103.35, the amount due at the date of the referee's report will be $9,930.18.

The other exceptions are overruled.

A. B.

July 12th, 1888.

206 United States Circuit Court, Southern District of New York.

THE BRADLEY FERTILIZER COMPANY, Libellant and Appellant,
vs.
THE SCHOONER EDWIN I. MORRISON, &c.—S. S. LAVENDER *et al.*, Claimant- and Appellant-.
} Opinion.

LACOMBE, *Circuit Judge:*

The grounds of decision in this case are perhaps sufficiently indicated in the findings. That the vessel was not unseaworthy by reason of overloading (a fault not charged in the libel) seems to have been the conclusion finally reached by the district court upon the rehearing. Such a conclusion is accordant with the testimony. Her behavior with seven feet of water in her well and a cargo of wet guano in her hold and the manner in which, after the leak was plugged, she recovered her buoyancy, should be conclusive on this point. So, too, on the rehearing, the district court found, as her witnesses testify, that before the plate was knocked off the vessel had encountered dangers of the sea, by reason of which there *was* eighteen inches of water in her well, and her cargo was damaged to a considerable extent. It is, indeed, hard to conceive by what casualty the plate could have been removed while the water-
207 way in which it was fastened was still on the weather side, and the evidence shows that they did not wear ship, thus developing the list to port, until after the eighteen inches of water had been found in her well.

It only remains to determine what caused the loss of the plate. There is no direct evidence on this point; only inferences to be drawn from known facts. That it was knocked out of sound wood by a blow from some floating article, which left no marks of violence upon the bulwarks or stanchions, because it was swept overboard through the open port is certainly not impossible; that the wood was rotten or the fastenings defective seems disproved by the condition in which the holes were found. The vessel was not originally unseaworthy because she had bilge pump holes covered as these were. The presumption of continuing seaworthiness in respect to this part of the ship is not rebutted by the single fact that no special test was made as to their condition, in view of the testimony (especially that taken in this court) as to what is the usual examination given to such structures. They are considered as permanent fixtures, are located in the upper works, where they are almost constantly in view, and are not liable to deterioration from the lapse of time. Moreover, the evidence as to the condition of the waterway and as to the torn and ragged appearance of the holes indicates that they were reasonably fit to resist the ordinary shocks and action of the sea, and were displaced by an accident of an extraordinary nature, and the application of a degree of force
208 which a reasonably skilful and prudent owner would not have anticipated or guarded against.

There is no question of latent defect, the inference to be drawn

from the testimony being that there was no defect, patent or latent; that the fastenings were sufficient, and were knocked out by a blow such as could not reasonably have been anticipated and which was caused by a danger of the sea.

October 24th, 1889.

E. HENRY LACOMBE.

209 Circuit Court of the United States, Southern District of New York.

THE BRADLEY FERTILIZER COMPANY, Libellant & Appellant,
vs.
THE SCHOONER "EDWIN I. MORRISON," HER TACKLE, ETC.—STEPHEN S. LAVENDER *et al.*, Claimants & Appellees.

Geo. A. Black; Wilcox, Adams & Macklin.

LACOMBE, *C. J.:*

Upon the two principal amendments to the findings asked for by the libellants, namely, (1) to insert the word "apparently" in the 23rd finding and (2) to prefix to the 24th finding the words "It is to be inferred from the facts found in the 16th finding," his motion must be denied. The libellant claims that there was in fact some defect or weakness in the plate and cap and the screws which secured it; that in consequence it washed out and allowed the water to enter the vessel. Whether such defect or weakness existed or not is a question of fact which it is the duty of the circuit court to decide. Such decision must be presented as a finding of fact to the appel-ate court.

The conclusion reached upon all the testimony was that there was no such defect. No doubt that conclusion was reached as an inference from the facts in proof. No one distinctly testified, "I made an elaborate examination of the cap plate and screws before the vessel sailed. They were then in sound condition, and I
210 saw them knocked out by floating stuff washing across the vessel's deck and out through the open port."

Nevertheless, the testimony, taken as a whole, indicates that this was in fact what happened. If this court should amend the 23rd and 24th findings in the manner suggested, the supreme court might reverse on the express ground that because there was no distinct finding of fact to that effect it must be inferred that the claimant- did not convince the circuit court, as a matter of fact, that the vessel was tight, and that there was no latent defect in the cap plate or fastenings; but that is the very conclusion to which an examination and comparison of all the testimony adduced on both sides has led this court, and therefore compliance with the act of 1875 seems to require the statement of such conclusion as a finding of fact.

Such others of the proposed amendments as are conceded will be found interlined in the original findings.

December 18, 1889.

(S'g'd) E. HENRY LACOMBE.

16—227

211 [Endorsed:] Bradley Fertilizer Co. *vs.* Sch. "Edwin I. Morrison." Copy. Opinion. Lacombe, C. J.

212 At a stated term of the circuit court of the United States for the southern district of New York, in the second circuit, held at the United States court-rooms, in the post-office building, in the city of New York, on the 10th day of September, 1890.

Present: Hon. E. Henry Lacombe, circuit judge.

THE BRADLEY FERTILIZER COMPANY, Libellant and Appellant,
against
THE SCHOONER "EDWIN I. MORRISON," HER TACKLE, &C.—STEPHEN S. LAVENDER *et al.*, Claimants and Appellants.

The appeal of Stephen S. Lavender *et al.*, claimants of the schooner "Edwin I. Morrison," from the decree of the district court of the United States for the southern district of New York, made and entered on the seventh day of August, 1888, and the appeal of the Bradley Fertilizer Company, libellant, from such part of said decree as overrules the first and second exceptions of libellant to the report of the commissioner on the question of damages and allows in part the tenth exception of the claimant- to said commissioner's report, by deducting ten per cent. of the damages awarded the libellant by the commissioner, having been heard upon the apostles and further proofs taken in the circuit court, and due deliberation having been had, and the circuit judge having made and filed
213 his findings of fact and conclusions of law to the effect that the claimants are entitled to a decree dismissing the libel herein and awarding said claimants their costs in the district court and in this court: Now, on motion of Wilcox, Adams & Macklin, proctors for claimants, it is—

Ordered, adjudged, and decreed that the said decree of the district court be, and the same is hereby, reversed, and the said libel be, and the same is hereby, dismissed, with costs of the district court, taxed at two hundred and twenty-two $\frac{35}{100}$ dollars, and of this court, taxed at three hundred and fifty-eight $\frac{24}{100}$ dollars, amounting altogether to the sum of five hundred and eighty-one and $\frac{29}{100}$ dollars.

It is further ordered, adjudged, and decreed that the claimants, Stephen S. Lavender *et al.*, recover herein against the libellant, The Bradley Fertilizer Company, the said sum of five hundred and eighty-one and $\frac{29}{100}$ dollars, the costs taxed as aforesaid, and that judgment be entered therefor.

And it is further ordered that unless an appeal be taken from this decree within the time limited by the rules and practice of this court and security be given, as required by law, to stay execution, within ten days after the entry of this decree, the clerk of this court pay to the claimants, Stephen S. Lavender *et al.*, or to their proctors, Wilcox, Adams & Macklin, the sum of four hundred and forty-three and $\frac{80}{100}$ dollars, deposited by the libellant and now in the registry of this court, in lieu of a stipulation for costs and as security therefor, in part satisfaction for this decree, and that the claimants,

Stephen S. Lavender *et al.*, have execution against the libellant to enforce satisfaction of the balance of the amount of their said taxed costs.

(S'd) E. HENRY LACOMBE.

214 (Endorsed:) U. S. circuit court, southern district of New York. The Bradley Fertilizer Company, libellant, *vs.* The Schooner "Edwin I. Morrison," her tackle, &c.—Stephen S. Lavender *et al.*, claimants. Final decree. Wilcox, Adams & Macklin, proctors for claimants, 69 Wall St., New York. U. S. circuit court. Filed Sept. 10, 1890. John A. Shields, clerk.

215 Supreme Court.

THE BRADLEY FERTILIZER COMPANY, Libellant & Appellant,
versus
THE SCHOONER "EDWIN I. MORRISON," HER TACKLE, &C.—STEPHEN S. LAVENDER *et al.*, Claimants & Respondents.

To the honorable the Supreme Court of the United States:

The appeal of the Bradley Fertilizer Company, the above-named libellant and appellant, respectfully showeth: That on the 20th day of March, 1884, the said libellant filed its libel in the district court of the United States for the southern district of New York against The Schooner "Edwin I. Morrison," her tackle, &c., in a cause civil and maritime, for the recovery of damages sustained by libellant to cargo belonging to it, laden on said schooner, and that said schooner was arrested upon process issued upon said libel and was discharged upon the claimants above named filing their claim and entering into stipulations; that said claimants filed their answer to said libel and your petitioner replied thereto, and such proceedings were had in the said cause that on the 7th day of August, 1889, a final decree was made and pronounced therein by the said district court, wherein it was in substance adjudged that your petitioner, the said libellant, recover against the schooner "Edwin I. Morrison" the sum of $10,028.96, together with costs.

216 That after such final decree the said claimants and also your petitioner duly appealed therefrom to the circuit court of the United States for the southern district of New York, and the said cause was removed thereby into the said circuit court and there tried anew, and such proceedings were had in the said circuit court that afterwards, on the 10th day of September, 1890, the said circuit court made a final decree in said cause reversing the said decree of the district court and dismissing the libel of your petitioner with costs; which said decree of the said circuit court is, as this appellant is advised, erroneous and ought to be reversed.

Wherefore this appellant appeals from the whole of the said decree of said circuit court to the Supreme Court of the United States and respectfully prays that the decree of the said circuit court and the libel, answer, pleadings, depositions, evidence, and proceedings in the said cause may be sent to the Supreme Court of the United

States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court and every part thereof may be reversed and a decree made awarding libellant its damages, or such other decree as to the Supreme Court shall seem just.

Dated Sept. 10th, 1890.

GEORGE A. BLACK,
Proctor for Libellant & Appellant.

Allowed.
(Sg.) E. HENRY LACOMBE.

217 [Endorsed:] U. S. Supreme Court. The Bradley Fertilizer Company, lib't & app'l't, *vs.* The Sch'r "Edwin I. Morrison," her tackle, &c.—Stephen S. Lavender *et al.*, claim'ts & appellees. Appeal. George A. Black, proctor for app'l't, 71 Wall street, New York city. To —— ——. Due service of a copy of the within appeal is hereby admitted. Dated Sept. 10, 1890. Wilcox, Adams & Macklin, proc's — cl'm'ts & appellees. U. S. circuit court. Filed Sept. 10, 1890. John A. Shields, clerk.

Please take notice that the —, of which the within is a copy, was this day — in the office of the clerk of this court.

Dated ——, 18—.

Yours, &c.,
GEORGE A. BLACK,
— *for* —, 71 *Wall Street, New York.*

To —— ——.

218 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on the 10th day of September, in the year of our Lord one thousand eight hundred and ninety.

Present: The Honorable E. Henry Lacombe, circuit judge.

THE BRADLEY FERTILIZER COMPANY, Libellant & Appellant,
vs.
THE SCH'R "EDWIN I. MORRISON," HER TACKLE, &C.—STEPHEN S. LAVENDER *et al.*, Cl'm'ts & Resp'ts.

The above-named libellant having applied to the circuit court to fix the amount of security to be given by said libellant on its appeal to the Supreme Court of the United States from the final decree herein, now, after hearing George A. Black, counsel for libellant, and George B. Adams, Esq., counsel for claimants, on motion of George A. Black, proctor for libellant, it is ordered that the amount of security to be given by said libellant on appeal to the Supreme Court from the final decree herein be, and the same hereby is, fixed at the sum of two hundred & fifty dollars.

And it is further ordered that the libellant have leave to deposit in the registry of this court the sum of two hundred & fifty dollars

in lieu of a bond on appeal for that amount, and that upon
219 its making such deposit execution to enforce the final decree of this court herein be stayed pending said appeal.

(S'g'd) E. HENRY LACOMBE.

Approved as to form.
WILCOX, ADAMS & MACKLIN,
Proct. for Cl'm'ts & Appellees.

[Endorsed:] U. S. circuit court, south'n district of N. Y. The Bradley Fertilizer Company *vs.* The Sch'r "Edwin I. Morrison," her tackle, &c.—Stephen S. Lavender *et al.*, cl'm'ts. Order. Geo. A. Black, lib't's proctor, 71 Wall St., N. Y. U. S. circuit court. Filed Sept. 10, 1890. John A. Shields, clerk.

220 Circuit Court of the United States for the Southern District of New York.

THE BRADLEY FERTILIZER CO., Libellant,
vs.
SCH'R "EDWIN I. MORRISON," &C.—STEPHEN S. LAVENDER, Claimant. } No. 826.

Received, New York, Sept. 10, 1890, of George A. Black, proctor for above-named libellant, the sum of two hundred & fifty dollars, the same to be deposited in the registry of the circuit court of the United States for the southern district of New York as security on appeal to Supreme Court U. S., per order of said court filed and entered Sept. 10, 1890.

$250.00.

JOHN A. SHIELDS, *Clerk.*

221 [Endorsed:] Circuit court U. S., southern district New York. No. 826. The Bradley Fertilizer Co., libellant, *vs.* Sch'r "Edwin I. Morrison," &c.—Stephen S. Lavender, claimant. Receipt of clerk for money deposited in registry.

222 By the Honorable E. Henry Lacombe, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

To Stephen S. Lavender and others, claimants of the "schooner Edwin I. Morrison," her tackle, etc.:

Whereas the "Bradley Fertilizer Company," libellant, has lately appealed to the Supreme Court of the United States from the decree lately rendered in the circuit court of the United States for the southern district of New York, in the second circuit, made in favor of you, the said Stephen S. Lavender and others, dismissing the libel of the said "Bradley Fertilizer Company" against the schooner "Edwin I. Morrison," her tackle, etc., and has filed the security required by law, you are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at

Washington, on the second Monday of October, 1890, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, the 10th day of Sept'r, in the year of our Lord one thousand eight hundred and ninety.

(S'g) E. HENRY LACOMBE.

223 [Endorsed:] U. S. Supreme Court. The Bradley Fertilizer Company, appellant, *vs.* The Sch'r "Edwin I. Morrison," her tackle, &c.—Stephen S. Lavender *et al.*, cl'm'ts & appellees. Citation. George A. Black, proctor for app'l't, 71 Wall street, New York city. Due service of a copy of the within citation is hereby admitted. Dated Sept. 10, 1890. Wilcox, Adams & Macklin, proc's — cl'm'ts & appellees. U. S. circuit court. Filed Sept. 10, 1890. John A. Shields, clerk.

Please take notice that the —, of which the within is a copy, was this day — in the office of the clerk of this court.

Dated ——, 18—.

Yours, &c.,

GEORGE A. BLACK,
— *for* —, 71 *Wall Street, New York.*

To —— ——.

224 UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to 223, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The Bradley Fertilizer Company, libellant & appellant, against The Schooner "Edwin I. Morrison," her tackle, &c.—Stephen S. Lavender *et al.*, claimants & respondents—as the same remain of record and on file in said office.

Seal of U. S. Circuit Court, South. Dist. New York.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this eighth day of October, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the said United States the one hundred and fifteenth.

JOHN A. SHIELDS, *Clerk.*

Endorsed on cover: Case No. 14,232. S. New York C. C. U. S. No. 227. The Bradley Fertilizer Company, appellant, *vs.* The Schooner "Edwin I. Morrison," her tackle, &c.—Stephen S. Lavender *et al.*, claimants. Filed October 9, 1890.

227

153-199

Office Supreme Court, U.
+FILED+
DEC 27 1893
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

THE BRADLEY FERTILIZER COMPANY,
Libellant and Appellant,

vs.

THE SCHOONER "EDWIN I. MORRISON," her Tackle, &c.,
STEPHEN S. LAVENDER ET AL.,
Claimants and Appellees.

Brief for Libellant-Appellant.

GEO. A. BLACK,
Of Counsel for Appellant.

C. G. BURGOYNE, Cor. Walker and Centre Sts., N. Y.

INDEX.

	PAGE
Statement	1
Assignment of Errors	4
Finding of Fact Without Evidence or Against Undisputed Evidence and Refusal to Find Material Facts Established Is Error	7
The Opinions Below	8
Inferences from Circumstantial Facts Present Question of Law	14
Claimant's Witnesses	21
Warranty of Seaworthiness	21
"Dangers of the Sea"	27
Illustration	28
Burden of Proof	29
Shipowner Must Establish Seaworthiness	31
The Obligation to Inspect	33
Want of Inspection is Negligence	34
The 13th Finding	34*a*
Logbook as Evidence	35
Some Minor Discrepancies	62
Overloading of Schooner	63
Facts as to Overloading	63
Necessary Freeboard	64
Measurements	64
Motives for Overloading	67
Movable Cap at Bilge-Pump Plate	67
Appearance of Cap	68
When Bilge-Pump Plate Was Lost	69
The Exaggerations	69
Exceptions to Evidence	69
The Damages	71
Interest in Admiralty	72
Mistake of the Circuit Judge	74
Burden of Proving Unseaworthiness	75
The American Doctrine	75
The English Law	79
Presumption of Seaworthiness—English Cases	81
" " " Massachusetts Cases	84
" " " Cases in U. S. Courts	86
Description of Schooner (Appendix)	94

Supreme Court of the United States.

THE BRADLEY FERTILIZER CO.,
Libellant and Appellant,

vs.

The Schooner "EDWIN I. MORRISON," STEPHEN S. LAVENDER ET AL.,
Claimants and Appellees.

BRIEF FOR LIBELLANT.

Statement.

The schooner "Edwin I. Morrison" was chartered to the libellant for a voyage from Weymouth, Mass., to Savannah, Ga., to carry a complete cargo of guano in bulk and bags (1st Finding, p. 11, *22*).

By the charter-party it was agreed on the part of the vessel that she "should be *tight, staunch and strong*, and in every way fitted for such a voyage." Perils of the seas were thereby excepted (2d Finding, p. 11, *22*). The libellant shipped 756 long tons (22, *45*) of guano, &c., and bills of lading were given therefor by which the vessel acknowledged the receipt thereof in good order, and agreed to deliver the same at Savannah in like good order, "*the dangers of the seas only excepted*" (3d Finding, p. 11, *23*).

This cargo was what is known as a "dead cargo," and a hard one for a vessel to carry in severe weather (4th Fdg., p. 11, *23*).

The voyage began January 5th, 1884 (13th Fdg., p. 13, *26*), and the schooner arrived in Savannah January 27th (21st Fdg., p. 16, *31*), and the cargo was delivered, *some of it in a damaged condition. The extent of the damage* was $9,175.40 (22d Fdg., p. 16, *31*).

For this damage the shipper of the cargo libeled the schooner in United States District Court, Southern District of New York, on March 20, 1884 (p. 1), alleging the charter (copy set forth), the loading, the bills of lading, the sailing from Weymouth, the arrival at Savannah and *delivery of the cargo in a damaged condition* (pp. 1, 2).

The contract of affreightment thus alleged, and *breach*, made a complete cause of action (Trans. Co. vs. Downer, 11 Wall., 129; Woodley vs. Michell, 11 Q. B. D., 51), and the pleader might well have then stopped, but he further sets out details in respect to the *insufficiency* of the schooner, viz., "that the cap was gone from off "the bilge-pump hole on the port side of said schooner, or was then "so loosely, insecurely and negligently fastened and screwed that "the same worked and *came off* without any danger of the sea in- "tervening, whereby said vessel was *unseaworthy and unfit for said* "*voyage*," etc., and that about seven feet of water was admitted into the hold and upon the cargo (p. 2, *3, 4*).

The answer [filed July 22, 1884 (p. 4, *8*), *after* the examination by libellants of Capt. Lavender (p. 22, *44*)] admitted the charter, shipment, bills of lading, sailing, arrival and delivery of cargo in a damaged condition, and, as an excuse therefor, alleged:

"*Ninth.* The claimants, further answering, allege that on said "voyage the vessel encountered very rough and tempestuous "weather, in consequence of which she shipped large quantities of "water and was greatly damaged by the seas, and it was found, on "the arrival of the said vessel at Savannah, that her said cargo, or "a portion thereof, *was damaged by the said perils of the seas en-* "*countered on the said voyage, or from causes excepted in the said* "*contract or contracts of affreightment*" (p. 5, *10*).

The square issue of "EXEMPTION" by reason of sea perils was thus presented, with all its consequences as to the BURDEN OF PROOF.

This case presents as its prominent feature the fact that the loss of the port bilge-pump plate allowed water to enter the hold of the vessel until she was found to have more than seven feet in her. Both **before** the loss of the plate and **after** the hole was stopped up, her pumps controlled all her leakage. The large quantity of water she took in, which soaked into and increased the weight of her cargo, caused her to labor and strain, and she leaked much more in the latter part of her voyage than before the loss of the bilge-pump plate.

The log gives the history of the occurrences of the voyage, **and makes the finding of all other causes of leakage SUBSEQUENT IN DATE** to the loss of the bilge-pump plate, and its verity, so far as it bears against the owners of the vessel, must be accepted when it is brought in conflict with the recollection of witnesses, especially when they say that they do not remember.

Nearly eleven years before, this bilge-pump plate had been set into the waterway, so that its surface was flush with that of the waterway except where the *beveled* edge of the screw cap projected about *one-eighth of an inch* above it. It was fastened with four brass screws around which verdigris forms, so that they get loose. It had never been examined or unscrewed for five years.

The strongest evidence against the claimants in this case *consists in their omission to either produce the piece of the waterway in which the plate was set, or to call a survey of expert witnesses shortly after the injury. The condition of the screws was not shown by any evidence.* The starboard plate, located on the poop deck four and a half feet higher up and not exposed to the wash of the water as those on the main deck were, would afford no indication.

The captain described the incidents of the voyage and said that the vessel's pumps were usually sounded every two hours (23, *46*), and that nothing more than the natural and usual leakage of the vessel was found (26); that on the morning of January 10th, before daylight, about five o'clock, eighteen inches of water were found in her; the vessel had been hove to on the port tack (23, 28), the wind being from the southward and westward (23).

Before finding the eighteen inches of water they started pumping at about 4.50 (47), and in order to stand at the pumps (23, *46*) the vessel was got before the wind by keeping her off (23, *46*) on the starboard tack (28, *54*) and with a list to port (24), and continued so until between nine and ten o'clock, when they wore ship (24) and then hove to on the opposite tack; wearing ship righted the vessel up and brought her port side out of water (24), and then the second mate discovered that the bilge-pump plate on the port side, in the waterway on the main deck, was gone—plate, cap and screws (49, *90*); the hole was immediately stopped up with oakum, canvas and lead, and after pumping for six or seven hours the pumps sucked (24, *48*); the pumps suck with four inches of water in the well-hole (25).

ASSIGNMENT OF ERRORS.

The record contains "*all the evidence bearing upon the matters excepted to*" (p. 22, 44).

The libellants excepted to the following findings (pp. 19 to 22):

(**1**) To the **5th** (p. 12), "*that the vessel was not overloaded,*" as contrary to the uncontradicted evidence.

(**2**) To that part of the **7th** (p. 12) which states "*that the removable cap projected three-eighths of an inch above the surface of the plate,*" as contrary to the uncontradicted evidence. Such evidence showing that the cap did not project more than one-eigth, and was beveled.

(**3**) To that part of the **11th** (p. 13) which states that the "*cap and plate appeared to be in good order with no indication of looseness,*" as unsupported by evidence.

(**4**) To that part of the **13th** (p. 14) which states that "*planks, &c., were carried away,*" so far as the same finds that they were so carried away "*before*" the loss of the bilge-pump plate, and therefore as a possible *cause* of such loss or indication of the severity of the weather at the time *of such loss of the bilge-pump plate* as without evidence, and contrary to the uncontradicted evidence.

(**5**) To that part of the **13th** (p. 14) which states that "*a spar was * * * floating on both sides*" of the vessel, as contrary to the uncontradicted evidence.

(**6**) To that part of the **13th** (p. 14) which states that the inability of the men to work the pump on the main deck existed *prior to the loss of the bilge pump-plate,* as contrary to the uncontradicted evidence.

(**7**) To that part of the **16th** (p. 15) which states that "*it is to*" *be* **inferred** *from the facts proved that the bilge-pump plate was* "*knocked out by something striking violently against it*" on the ground that there is no evidence to support it, "*nor is such a finding* "*one which the law permits on the evidence given in this case* **in**

" **view of the rule of law as to the burden of proof** " *applicable to the facts proved in this case.*"

(**8**) To that part of the **16th** (p. 15) which states that "*the bilge* " *pump plate was knocked out* **subsequently** *to the time when they* " *wore ship after finding 18 inches of water in the well,*" as without evidence and contrary to the proper inferences to be drawn **in view of the burden of proof.**

(**9**) To the **23d** (p. 16) which finds that "*the vessel was tight,* " *staunch and strong,*" as without evidence and contrary to the proper inference, **in view of the burden of proof.**

(**10**) To the **24th** (p. 16) which finds "*there was no latent defect* " *in the vessel,*" as without evidence and contrary to the proper inference **in view of the burden of proof.**

(**11**) To the **25th** (p. 16) which finds "*there was no fault or neg-* " *ligence in the navigation of the vessel or care of the cargo,*" as without evidence and contrary to the proper inference **in view of the burden of proof.**

(**12**) To the **26th** (p. 16) which finds that "*the damage to cargo* " *was caused by a danger of the seas,*" as without evidence and contrary to the proper inference **in view of the burden of proof.**

(**13**) To the **1st** and **2d** conclusions of law (p. 16), holding that the damage was attributable to "*dangers of the sea,*" and dismissing the libel.

(**14**) To the **refusal** (p. 17, *34*, V.) **to amend** the **13th** finding so as to make it appear that "*no part of said vessel was missing,*" as being material and conclusively proven.

(**15**) To the **refusal** (p. 17, *34*, V.) **to amend** the **14th** finding, by adding, "*no spars or sails were carried away, and no* " *repairs were made at Savannah, beyond nailing a few boards on the* " *starboard side where the bulwarks had been broken, which was done* " *by the crew, and the vessel, after discharging, loaded with a cargo of* " *phosphate rock, which is much harder cargo to carry than guano,*

" *and delivered it safely*," on the ground that the facts refused were and each of them was material and conclusively proven.

(**16**) To the **refusal** (p. 17, *34*, VII.) of the Court **to amend** the **23d** (p. 16) finding, by inserting the word "*apparently*" before the word "tight" on the ground that such amended finding was material and conclusively proven and that the unamended finding was without evidence and not properly to be inferred **in view of the burden of proof.**

(**17**) To the **refusal** (p. 17, *34*, VIII.) **to amend** the **24th** (p. 16) finding by inserting the words "*it is to be inferred—from* "*the facts found in the 16th finding*" before the words "there was "no latent defect"—in order that it might be made to appear that such finding was *a finding of a doubtful fact inferred from circumstantial facts* upon which there was doubt as to the legal effect, and that it thereupon became the duty of the Court to so frame its findings as to put the doubtful question into the record.

(**18**) To the **refusal** (p. 18, IX.) **to amend** the **26th** (p. 16) finding so as to read "*The whole of said damages to cargo was* "*caused by dangers of the seas specified in the* **13th, 16th** *and* "**20th** findings"—on the ground that such finding was a finding of an inferred fact based upon circumstantial facts alone, as to which there was doubt as to the legal effect, and that it thereupon became the duty of the Court to so frame it findings as to put the doubtful question into the record.

(**19**) To the **refusal** (p. 18, IX.) of the Court to find so much of the proposed **new finding** to be numbered **27**, as finds that the screws "*were liable to corrosion and injury from the lapse of time*" on the ground that the same was material and conclusively proven.

(**20**) To the **refusal** of the Court to find so much of the **5th** (p. 10, *21*) **finding of fact proposed** by libellant, as states "*that if the wood was sound and the screws sound and properly* "*proportioned to the hole in which they were inserted they would* "*break off before they would draw out of the wood*," on the ground that the same was a material fact and conclusively proven.

(**21**) To the **refusal** of the Court to find the **6th** (p. 10, *21*) **finding of fact proposed** by the libellant, that "*by some defect* "*or weakness of the cap and plate and the screws which secured it,* "*it came out of this hole on the voyage to Savannah and allowed the* "*water to enter the vessel, causing the cargo to become wet and dam-* "*aged,*" on the ground that such fact was material and conclusively proven **in view of the burden of proof.**

(**22**) To the **refusal** of the Court **to find the 7th** (p. 10, *21*) **proposed finding** of libellants, that "*the libellants' cargo was* "*damaged to the amount of $9,175.40 by the water which entered the* "*vessel by reason of the defect in the bilge pump plate,*" on the ground that the same was material and conclusively proven **in view of the burden of proof.**

(**23**) To the **refusal** to find libellants' proposed conclusion of law (p. 11).

POINTS.

It was error of law to find facts without evidence, or against the undisputed evidence, or to refuse to find a material fact proved by uncontradicted evidence.

The City of New York, 147 U. S., 77:

"If the Court below *neglects or refuses* to make a finding, one "way or the other, as to the existence of a material fact, which has "been established by uncontradicted evidence, or if it finds such a "fact when not supported by any evidence whatever, and an excep- "tion be taken, the question may be brought up for review in that "particular. In the one case the refusal to find would be equiva- "lent to finding that the fact was immaterial, and in the other that "there was some evidence to prove what is found, when in truth "there was none.

"Both of these are questions of law and proper subjects for "review in an appellate Court."

The Opinions Below.

The District Court decided in favor of libellants, and the Circuit Court decided against libellants, on substantially the same evidence —the only additional evidence being that of Candage, a marine insurance surveyor (p. 109, *186*), who had *looked at* the "Morrison" in 1882, *when his attention was not called to her bilge-pump plates* (111, *190*), and who testified as an expert.

The District Judge saw most of the witnesses, *and although this fact ought not to have any weight in an admiralty appeal*, it has been given weight by the Circuit Judges in other cases, and, *if it is sound law*, libellant is entitled to its application to this case.

The Deadly Parallel.

Brown, J. (Opinion, p. 114):

"The evidence leaves no doubt "that *most* of the water was "taken in through the bilge- "pump-hole. This was a hole (1) "in the *port* side, in the water- "ways (2), a short distance in "front of the poop, * * * "from 3 to 4 inches in diameter, "and was covered with a brass "plate about 4 inches square, "counter-sunk into the timber, "covered with a brass cap which "screwed into the plate. The "plate was fastened into the "water-ways by (3) screws. "* * * There was a similar "hole on the starboard side (4).

Lacombe, J.:

(1) 7th Finding (p. 12): Adds "*close to the bulwark*" (8th Finding adds, *opposite a port*).

(2) Adds ("of yellow pine" which was "3½ inches above the "deck").

(3) Adds "four brass."

(4) Adds "somewhat further "aft *and upon the poop-deck*" which is 4½ feet above the main deck, and extends from just about the mainmast to the stern (8th Finding, p. 13).

" * * * Such caps *usually* " project a *little* (5) above the " surface of the waterway (6), " the upper edge of the cap be- " ing beveled off so as to leave " usually *not more than an eighth* " of an inch of perpendicular " surface. They were placed " there in the construction of the " ship. Such bilge-pump holes " are not unusual in vessels and " seldom (7) have any accidents " arisen from them. The mode of " covering them above described " was deemed perfectly secure.	(5) Adds " $\frac{3}{8}$ of an inch." (6) Substitutes " plate " for waterway.
" The schooner was built some " eleven years previous."	8th Finding (p. 12):
(P. 117.) " These holes had " never been used."	(7) Adds " if ever."
	6th Finding (p. 12): " Built in 1873." 7th Finding (p. 12): " Had not been used for 4 or " 5 years, if, indeed, at all."
" They were dangerous, " unless the caps and plates to " cover them were kept perfectly " tight and secure."	8th Finding (p. 12): " If the plates and caps which " are generally used to cover " such holes are not kept tight " and secure, *the holes become dan-* " *gerous.*"
" The obligation to keep " watch of their condition " was as stringent as the " danger from weakness " in them was extreme." " Yet there is no satisfac- " tory evidence that there " had been more than a " casual examination of " them since the schooner " was built." * * *	10th Finding (p. 13): " The examination which was " at that time made of them " consisted of *such inspection as* " *could be given by the eye.* * * * " *They were not tested either by* " *unscrewing the cap or the plate,* " *or by tapping the plate with* " *a hammer.* Tapping with a " hammer or unscrewing the cap " might have developed any in- " security (if there were any) in " the bilge-pump plate. Imme- " diately after the loss *of the port*
" (P. 117.) From the evidence " it must be inferred that *for* " *several years past, at least, if*	

" *not ever since the schooner was* " *finished, the cap had not been* " *unscrewed* **nor the fasten-** " **ings of the plate tested."**	" *bilge-pump plate (hereafter de-* " *scribed), the mate tested the con-* " *dition of the similar plate on* " *the poop-deck starboard side by* " *tapping with a hammer."*
P. 117: " She was a staunch " vessel, and her behavior and " recovery, notwithstanding she " was on the verge of sinking, " are good evidence of her gen- " eral staunch character and " good handling. But, **being** " **deeply loaded,** *and sailing* " *down the coast in the winter* " *season, it was to be expected she* " *would encounter storms, and* " *that her decks would all the more,* " **from her deep loading,** " be swept by heavy seas. Be- " fore starting out thus deeply " loaded, **she was bound to** " **have seen that the** " **plates and caps in her** " **water-ways were all** " **fast and secure** *against or-* " *dinary accidents or collisions* " *that might come from loose ob-* " *jects swept by the seas across* " *her decks."*	5th Finding: " She was not " overloaded." *Ignored by the Circuit Judge.*
P. 118: " I think *the only reas-* " *onable conclusion is that, after* " *eleven years' service, the fasten-* " *ings had become weak*, and that " the plate was carried away " from that cause."	8th Finding: " Verdigris " sometimes forms around brass " screws, *thus weakening the hold* " *of the wood."*
P. 118: " The fact that the " starboard plate was still secure " does not prove that the *port* " plate might not have become " loose and weak."	7th Finding: " The starboard " plate was on the poop deck " (8th Finding) " four and one-half " feet *above* the main deck."

P. 116: "*The claimant did not* "*introduce any proof by exact* "*measurements* to show what "was the height of the cap above "the water ways or the height "of the perpendicular edge up "to the beveling; **nor was the** "**duplicate cap on the** "**starboard side pro-**"**duced.**"*

Ignored by Circuit Judge.

P. 115. "The **theory** of the "defense is that the plate and "cap were perfectly tight, but "through the many seas taken "aboard and the washing about "of many articles upon the deck, "particularly of the heavy cover "of the chain lockers that had "got adrift, the bilge plate and "cover, though perfectly sound "and tight in their setting, were "knocked off by violence or "some accidental blow of the "floating articles.

"*For the libelants it is urged* "that this explanation is purely "**hypothetical** and not en-"titled to be accepted as *a dis-*"*charge of the ship's* **presump-**"**tive** liability."

P. 118. "There had been no "careful inspection for a long "time to *make sure* of its safety "and strength. **Its insuffi-**"**ciency, though latent,** "**was legally at the risk** "**of the vessel.**"

16th Finding (p. 15): "As no "one witnessed the removal of "the bilge pump plate, direct "evidence of the cause of this "mishap is not attainable. *It* "*is, however,* **to be inferred** "from the facts proved that it "was knocked out by something "striking violently against it."

11th Finding (p. 13): "Be-"fore the vessel sailed the cap "and plate *appeared* to be in "good order."

Opinion (p. 120): "**The pre-**"**sumption of continuing** "**seaworthiness** in respect "to this part of the ship *is not* "*rebutted* by the single fact that "no special test was made as to "their condition."

Opinion (p. 120): "There is "no question of *latent* defect, the "*inference* to be drawn from the "testimony being that there was "no defect patent or latent."

---

* In Douglas vs. Scougall, 4 Dow's R. [H. of Lords], 278, (1816), Lord ELDON said: "I do not say anything as to the log-book; but cases have been sometimes "decided *on what is not given in evidence* as well as on what is given."

P. 118. " To be ascribed to a " peril of the seas **the burden " of proof is upon the " vessel** *to show that the plate " and cap were probably carried " away by extraordinary contin- " gencies not reasonably to be an- " ticipated.*"

Opinion (p. 120): **" The pre- " sumption of continuing " seaworthiness** in respect to " this part of the ship is not re- " butted, &c."

P. 118. " It does not appear " that she lost a spar or a bit of " canvass, although there was " doubtless a long continuation " of heavy weather."

Ignored by the Circuit Judge, but the V. amendment to 14th Finding (17, *34*) *to same effect* refused.

P. 116 : " It is doubtless pos- " sible that **if** one of the heavy " chain locker-covers had been " swept violently across the " deck *in an exactly level posi- " tion, and with a sharp and hard " edge*, had hit the upright sur- " face of the cap, that might " have torn off the cap and plate " and account for this accident. " *The probabilities of any such " contact of a sharp and solid " edge* of one of these covers *in " the exact position to do this are " exceedingly small.* The cap and " plate were upon the water ways, " and a number of inches *above* the " deck. The second mate says " the covers were ' *water-logged.*' " They would hardly seem capa- " ble of inflicting any blow that " would not slide off and over " the **beveled edge** of the cap, " if the cap and plate were se- " curely fastened."

Opinion (p. 120) : " The *pre- " sumption of continuing sea- " worthiness*," &c.

P. 116 : **" It seems incred- " ible, moreover, that any " such blow could have**

" been given that would " not have left its marks " upon the stanchions and " bulwarks on the port " side, which were within a " few inches of the plate, *yet* " *no such marks appear, nor* " *was anything broken or car-* " *ried away in that vicinity,* " *except the cap and plate,* al- " though, on the *starboard* side, " the bulwarks were, in some " places carried away. **There is, " in fact, no evidence of " any such violent blow " in the region of the cap " and plate, as is assumed " by the claimant."**	15th Finding : " No marks of " violence, other than the splint- " ering the wood about the screw " holes, was visible upon the " waterway or upon the adjacent " bulwarks or stanchions."
P. 118 : " The *improbability* " that any of the supposed causes " should have carried away the " plate, if it had been properly " secured at the time of sailing, " without doing any other damage " to the bulwarks or stanchions " adjacent, *I deem so great,* that I " feel constrained to ascribe the " cause, *in the absence of proof of* " *any thorough trial or inspection* " *of the plate* before the schooner " sailed, **to the gradual " weakening of the fast- " enings** during the eleven years " since the vessel was built."	8th Finding : " Verdigris forms " around brass screws, thus " weakening the *hold* of the " wood."
P. 117 : " The testimony on " behalf of the vessel at the trial, " I must deem somewhat **exag- " gerated,** both as to the " severity of the gales she met, " and as to the amount of water " on deck **prior** to the time when " the leak became serious.	Ignored by Circuit Judge.

"**After the leak increased rapidly, she necessarily settled GRADUALLY LOWER IN THE WATER, and, consequently was MUCH more swept by the seas.**	Ignored by Circuit Judge.
"It is noticeable that, although **the log says** that the vessel, on the 9th, was laboring heavily and shipped great quantities of water, *this is not stated to have been the case on the 10th, until after 8 A. M.*, **several hours after this heavy leak** *began.*" See Log, p. 98.	Ignored by Circuit Judge.

Inferences from Circumstantial Facts Present a Question of Law.

The XV. finding is that, "As no one witnessed the removal of the "bilge-pump plate *direct* evidence of the cause of the mishaps is not "obtainable. It is, however, **to be inferred** *from the facts* "*proved that it was* knocked out," &c., &c. (p. 15).

The XXIII. finding is, "At the time of the contract and lading "of cargo and commencement of voyage the vessel was tight, "staunch and strong, and in every way fitted for the contemplated "voyage" (p. 16).

The Court refused to amend this finding by inserting the word "apparently" before the word tight (see VII., p. 17), and libellant excepted (see XVIII., p. 21), and also excepted to the finding as without evidence, and that the contrary was to be **inferred** from the facts proved, in view of the "burden of proof" (see X., p. 20).

The XXIV. finding is, "There were no latent defects in the "vessel which contributed to the injury to the cargo."

Libellants moved to amend by inserting **"it is to be inferred** from the facts found in the 16th finding" before "there was no latent," &c.—which the Court refused to do (see VIII., p. 17)—and

excepted to the refusal (see XIX., p. 21), and also to the finding as without evidence, and that the contrary was to be *inferred* from the facts poved, in view of the "burden of proof" (see XI., p. 20).

The above findings, requests, refusals and exceptions may be grouped and considered together.

As to the 23d finding, it is obvious that the Court adopted as the law what is expressed in the opinion (p. 120)—"*the presumption of continuing seaworthiness*," &c.—and took such presumption as supplying proof that the vessel was "tight, staunch and strong" as to the bilge-pump plate and its fastenings.

Also as to the 24th finding, if this erroneous presumption is eliminated from the case there is then left only such **inference** as can properly be drawn from the mere *observation* (p. 24), without any test, and *the entire want of evidence* of any actual observer of the methods actually used in construction (p. 41).

This is a question of law.

Sun Mutual Ins. Co. vs. Ocean Ins. Co. (107 U. S., 485). MATTHEWS, J. (502): "In other words, when the testimony "has been sifted and weighed, and the actual circumstances of the "transaction stated in a connected form, the law, *by means of its* "*presumptions*, determines whether they establish such a relation "between the parties as to give rise to reciprocal rights and obligations, and, if so, what legal consequences have followed. The "issue to be determined may be one *in form*, merely of fact, as "whether a particular contract was made, or whether one or both of "the parties have been guilty of negligence. The *circumstances of* "*the entire transaction having been ascertained and stated, the issue is* "*determined by the interpretation which the law puts upon them.* "This is an office quite distinct from ascertaining the circumstances "themselves by the process of reduction from the original mass of "evidence. It involves only a consideration of the facts as found "in their relation to each other, in view of fixed legal presumptions, "*in order to determine and declare the effect to be given to them as a* "*connected whole.*"

In this case it became necessary to prove the identity of two insurances. The findings of fact in the Circuit Court did not assert it; it contained other facts *bearing* on the question. The first conclusion *of law* was that the Sun Company's policy covered the Rotterdam charter, and the Court said (501):

"The question, therefore, presented to us on this appeal is, not "whether that *might be true* as a conclusion of fact from the cir-

" cumstances stated in the findings of fact, but whether, *upon the* " *facts found, it must be true as matter of law.* The distinction is " obvious and important."

The Court then considers the difference between presumptions of fact and rebuttable presumptions of law, and then follows this enunciation, which is decisive :

(503) " This rule was, after much consideration, established in " United States vs. Pugh, 99 U. S., 265, in reference to the exam- " ination of the judgments of the Court of Claims, and we reiterate " it here *as equally applicable to appeals from the decrees in admiralty* " *of the Circuit Courts of the United States under the Act of 1875.* " In that case, one of the issues to be determined was whether the " proceeds of the sale of the captured property belonging to the " claimant had been paid into the treasury. *No direct proof to that* " *effect had been given, but if shown at all it was* **by way of infer-** " **ence** *from circumstantial facts* established by the evidence, and " set forth in the finding of the Court below. The Chief-Justice " said, upon this point : ' Confessedly, the Court has found all the " ' facts which have been *directly* established by the evidence. These " ' facts are not evidence in the sense that evidence means the state- " ' ments of witnesses, or documents produced in court for inspec- " ' tion. *They are the results of evidence, and whether they establish* " ' *the ultimate fact to be reached is, if a question of fact at all, to say* " ' *the least, in the nature of a question of law.* If what has been " ' found is, in the absence of anything to the contrary, the legal " ' equivalent of a direct finding that the proceeds of this claimant's " ' property have been paid into the treasury, the judgment is right ; " ' otherwise, it is wrong. *The inquiry thus presented is* **as to the** " ' **legal effect** *of facts proved,* not of the evidence given to " ' make the proof,' &c. * * * ' *The rule relieves us from the* " ' *necessity of considering the evidence at all,* and confines our atten- " ' tion to the legal effect upon the rights of the parties of the facts " ' proven as they have been sent up from the Court below. In this " ' way the weight of the evidence is left for the sole consideration " ' of the Court below, *but the ultimate effect of the facts which the* " ' *direct evidence has established is left open for review here on* " ' *appeal.*' "

Turning to the case of the **United States vs. Pugh** (99 U. S., 265), I make the following additional extract therefrom :

(270) " And the question of practice to be settled is whether, " under our rule, the judgment of the Court of Claims as to the legal

" effect of what may, perhaps not improperly, be called the ultimate " *circumstantial* facts in a case is final and conclusive, or whether it " may be brought here for review on appeal.

" From what is said in Ross' Case (12 Ct. of Cl., 565), and by " the reporters in a note (11 *Id.*, 344), we are led to suppose that " the Court of Claims understands that our decision in United " States vs. Ross (92 U. S., 281) and Intermingled Cotton Cases " (*Id.*, 651) leave this question somewhat in doubt. **To avoid " misapprehension in the future, we take this oppor- " tunity to say that we not only think such a judg- " ment may be reviewed here if the question is " properly presented, but that when the rights of " the parties depend upon circumstantial facts alone, " and there is doubt as to the legal effect of the facts, " it is the duty of the Court, when requested, to so " frame its findings as to put the doubtful question " into the record.** This would not require us on the appeal to " decide upon the weight of evidence. That is done in the court " below, when the particular fact is found which the evidence tends " to prove. The effect of mere evidence stops when the fact it " proves is established. After that the question is as to the effect " of the fact; and when the evidence in a case has performed its " part, and brought out all the facts that have been proved, these " facts thus established are to be grouped, and their legal effect as a " whole determined.

Gilroy vs. Price, A. C., 1893, p. 64 :

WATSON, J. : " It does not appear to me that your Lordships " are by the terms of Section 40 of the Act of 1825 precluded " from entertaining and deciding the questions raised upon the 5th " *finding*, which, according to the terms of the interlocutor, profess " to be one of fact. *In my opinion, that is not its true character. If " not a pure finding of fact and law, it appears to me to be a mixed " finding of fact and law, and embodies the application of legal prin- " ciples to the actual facts otherwise found.* I rather think it was " meant by the Court to be a finding to the effect that these facts " did not constitute *unseaworthiness in the sense of law*, but merely " amounted to such neglect of the master or crew as fell within the " accepted risk."

Stimson vs. Brown, 68 N. Y., 358 : " It is stated to be a " finding of fact. It is obvious, however, that it is *a conclusion or*

" *inference* from other facts. It is excepted to by the defendant, " and we may inquire whether there is anything in the testimony to " sustain it."

The Circuit Court refused to make a new finding No. 27 (see IX., p. 18), and libellant excepted (see XXI., p. 21). This proposed finding contained some of the circumstantial facts from which the **inferred** fact that there was a latent defect in the vessel could be properly drawn, viz.: " No proof was given of " the size of the screws used in fastening the bilge-pump plate in " place nor as to the manner in which they were inserted, nor of " their sufficiency to hold said plate, nor of their condition when " carried away."

It had been testified that a brass screw of two inches in length would break off rather than pull out of sound wood (Lawrence, 35, *67, 69*). That it could only be got out by turning it back (Rosevelt, 33, *64*), and would break the plate or tear the head of the screw off before it would let go (Willetsen, p. 39, *73*), always provided the screws were properly proportioned to the screw holes *and that the wood was sound (Id., idem)*.

The above evidence *(wholly uncontradicted)* was embodied in the latter part of libellant's 5th proposed finding (p. 10, *21*) as follows: " If the wood was sound, and the screws sound and properly pro- " portioned to the hole in which they were inserted, they would " break before they would draw out of the wood."

And libellant excepted to the refusal to so find (see XXIV., p. 22).

If such *circumstantial* fact were found, the inference to be drawn from *the fact proved—that the screws did* draw out and were *lost with the cap* (see last line of 13th Finding, p. 15)—would have justified the 6th of libellant's proposed findings (see VI., p. 10), that " by some " defect or weakness the plate and cap and the screws which secured " it, it came out of this hole;" and the libellant's exception to the refusal to so find (see XXV., p. 22) is valid.

Equally pertinent and material as circumstantial facts was the libellant's request to amend the 14th finding (see V., p. 17) by adding: " No spars nor sails were carried away (1), and no repairs were " made to the vessel at Savannah beyond nailing a few boards on " the starboard side where the bulwarks had been broken which " was done by the crew; (2) and the vessel after discharging loaded " with a cargo of phosphate rock, which is a much harder cargo to

" carry than guano; (3) and delivered it safely " (see XVII. Exception, p. 20).

(1) Judge BROWN says (pp. 118 to 202): " It does not appear " that she lost a spar or a bit of canvas," and such was the uncontradicted testimony. Capt. Lavender said (p. 29, *56*): " I did not " carry away any spars nor sails."

(2) Captain Lavender (p. 31, *60*): " I mean some of the planking " off the bulwarks. The *mate* repaired it with boards. It has not " been repaired since."

Although pieces of the starboard bulwarks were broken or started off, " none of the stanchions were carried away " (Cahoon, 53, *98*).

" There were no repairs made to the vessell in " Savannah, with the exception of putting some new stuff over " the hole we are speaking of. The mate and myself did that " (Cahoon, 52).

" She has been running all the time, and never has been repaired " excepting caulking " (Atwood, 66).

As to the bilge-pump hole Capt. Lavender said (p. 27): " The first " mate did the actual nailing down of this lead plate over the hole. " It was never taken off again before the voyage was completed. " He renailed it * * * on the passage. * * * It was altered " in Savannah by the mate; * * * he used new and larger materials. " It still has a piece of lead over it."

Richards vs. Hansen, 1 F. R., 65, CLIFFORD, J.: " The " Court below on the evidence then exhibited, found that the gales " were proved to be of extraordinary violence, and such as would be " likely to damage a seaworthy ship and to come within the usual " definition of such perils; *responsive to that, the first observation to be " made is,* **that the gales referred to did not damage the " steamer** *of the respondents in the slightest degree worth mentioning.*" * * * Witnesses called by the respondents, especially the officers " of the steamer, sustain the theory of the respondents *that the gales " which the steamer encountered were extraordinary, but in view of the " very slight damage to the vessel,* and the contradictory testimony in- " troduced by the libellants since the appeal, *the Court is of the " opinion that the violence of the gales* **was much exaggerated** " in the testimony of the officers as introduced in the Court below."

The Oguendo, 38 L. T., N. S., 151.

A further inference may be drawn from the fact that *no survey* was held on the vessel, as appears from the failure of claimants to prove that one was held.

The **Brig "Struggle,"** 9 Cranch., 75, LIVINGSTON, J.: "If "the 'Struggle' really encountered so much heavy weather and was "obliged, to avoid shipwreck and to preserve the lives of the crew, "to abandon a coasting for a foreign voyage, *it might be expected* "*that on her arrival at Martinico* **the ordinary process of "survey would have been called for.** Her situation would "then have been ascertained by professional and skillful men. *The* "*not taking a precaution so common in cases of distress and so neces-* "*sary for the master's exculpation*, if he acted without an under- "standing with his owner, while it leaves us in great doubt as to the "magnitude of the injuries and the imminence of the danger to "which the vessel and crew were thereby exposed, *is but little cal-* "*culated to excite a belief in the great extent of either.*"

"It is taken for granted that no such survey was had from the "silence of all the witnesses upon the subject and *from the manifest* "*interest* which the claimants had in producing it, if it in any de- "gree supported the testimony or the defense which he had set up."

The libellant was clearly entitled to the 5th request to find, and to the amendment to the 14th finding, and to the new 27th finding, all of which detailed circumstantial facts from which *inferences* could properly be drawn, which, when added to the XV. finding (p. 15), viz.: "No marks of violence *other than the splintering of the wood* "*about the screw holes*, was visible upon the waterway or upon the "the adjacent bulwarks or stanchions;"
and the VI. finding (p. 12), viz.: "The vessel was built in 1873," and was, consequently, eleven years old;
[**Note.** The Vincennes, 3 Ware, 174. WARE, D. J.: "In the "matter of seaworthines of the ship, especially of the hull, *age is* "*especially to be regarded.*"]
and the VIII. finding (p. 12), viz.: "Verdigris sometimes forms "around brass screws, thus weakening the hold of the wood."
would justify the inference that the loss of the bilge-pump plate was due to inherent defects in its method of fastening.

The presumption is that a defect developed without apparent cause in a vessel sailing under charter-party *existed when the service began*, and therefore is within the owner's implied warranty of seaworthiness.

Work vs. Lathers, 97 U. S., 379.
Afg. Work vs. Lathers, 1 Wood., 271.
Wilson vs. Griswold, 9 Blatch., 267.

The Claimants' Witnesses.

Is is a noticeable fact that all the witnesses called by the claimants as experts in the District Court were either owners or doing this vessel's business.

Atwood was the managing owner of the vessel, and had built her (pp. 40, *75*, 41).

Thurlow furnished the ship chandlery for this vessel (57).

Brett was an owner and agent of the vessel (pp. 62, *113*).

The failure to *produce* the piece of the log waterway, or any disinterested witness who had examined it, or to produce the starboard plate, or to hold a survey on the vessel, all raise an inference *in admiralty* against the vessel.

The presumption is that if produced they would tend to convict her.

The Warranty of Seaworthiness.

"Tight, staunch and strong, and in *every way* fitted for such "a voyage," says the charter-party (p. 3, *6*, 2d Finding, p. 11).

Work vs. Leathers, 97 U. S., 379: "Where the owner of a "vessel charters her or offers her for freight, **he is bound to see "that she is seaworthy** and suitable for the service in which "she is to be employed." * * *

The **Northern Belle**, 9 Wall., 529: "*He*" (owner of the barge) "*can and must know, at his own peril, the condition of the barge in "which he proposes to carry the goods of other people*, **while the "owner of the cargo IS UNDER NO OBLIGATION "to look after this matter; and he has no means of "obtaining any sure information if he should at-"tempt it."**

Note. Compare the above with the Circuit Judge's Tenth Finding (p. 13): "*Such bilge-pump plate was in plain view*, upon a "casual inspection of the vessel at the time of making the charter. "*The vessel was loaded several times before this voyage by the libel-"lant.*"

Does not the above show the *drift* of the Judge's mind, and indicate that, in his opinion, "the owner of the cargo was under an "obligation to look after this matter?" else why tell this Court, as a *material* fact, that libellant had already loaded this vessel several

times *before*—and, therefore (inferentially), must have had opportunities to see this plate "*in plain view* upon a *casual* inspection." But what right would the cargo owner have to *test* its security, or why put him to that test when he had the shipowner's express guaranty that it was tight and staunch. The Judge's mind was evidently here slanting off in the wrong direction.

The Northern Belle (Court below), 1 Biss., 532: "It was "the duty of the carrier to see to the sufficiency of the barge. *Any* "*opinion expressed upon that subject by agents of the insurance com-* "*pany or by the shipper form no excuse.* The whole responsibility "of the seaworthiness or fitness of the barge rests with the carrier."

Imagine the charterer negotiating with the shipowner, and on board the schooner pointing to each of the bilge-pump plates and demanding that it should be *tested* then and there, and from that to the lumber-ports and scupper-pipes, mast-coatings, rigging, and each part in detail! Could commerce go on if such tests were exacted *on each re-charter?* And must every cargo owner be an expert in ships, *at his peril?* Is it not enough that he has the *implied* warranty of the law or the *express* warranty of the contract for his protection?

Douglas vs. Scougall, 4 Dow's R. (House of Lords, 1816), 276, Lord ELDON, C.:

"I have often had to observe here that there is nothing in mat- "ters of insurance of more importance than the implied warranty "that a ship is seaworthy when she sails on the voyage insured, and "I have endeavoured, *both with a view to the benefit of commerce* "**and the preservation of human life,** to enforce that "doctrine, as far as in the exercise of a sound discretion I have been "enabled to do. It is not necessary to inquire whether the owners "acted honestly and fairly in the transaction, *for it is clear law that* "*however just and honest the intention and conduct of the owner may* "*be, if he is mistaken in the fact, and the vessel is, in fact, not sea-* "*worthy, the underwriter is not liable.*"

Schooner **Reeside,** 2 Sumner, 574, STORY, J.: "It has been "suggested that this case is of great importance to the packet-ship "interest. It may be so. But, in my judgment, the question is "quite as important to the shipping interest. And if packet owners "could, under circumstances like the present, escape from responsi- "bility for like losses, it would be in the highest degree mischiev- "ous to the best interests of trade and navigation. No honorable "merchant, tolerably attentive to his own interest, ought to be will-

" ing to risk his goods upon any voyage unless he can have some " adequate security against losses of so serious a nature. It would " be to hold out to packet masters a premium for indifference or " carelessness or want of vigilance in protecting the shipments con- " fided to their care. I cannot but deem *every relaxation of the* " *common law in relation to the duties and responsibilities of the own-* " *ers of carrier ships to be* **founded on bad policy** *and detri-* " *mental to the general interests of commerce.*"

Rogers vs. Sun Mut. Ins. Co., 46 Superior Ct., 65, FREEDMAN, J.—" The rule clearly deducible from all the au- " thorities is:

" 1. That it is competent for the underwriter to say in effect to " the applicant for insurance—

" You are, or represent, the owner of the vessel, *who is bound to* " *know all about her.* For my own protection I shall look as far as I " deem it expedient, *but after all, I shall rely upon the warranty of* " *seaworthiness of the vessel* to encounter with safety ordinary perils " of the voyage upon which you propose to send her—and

" 2. That the burden of establishing a different contract rests " upon the assured.

" This rule may, in some instances, act as a harsh one, *but it is* " *a reasonable and salutory one* **and public policy is against** " **its relaxation** in favor of the owner, because upon its enforce- " ment depends in a great degree the safety of the crew and pass- " engers."

The Glenfruin, 10 P. D., 107, BUTT, J. (108)—" I have " always understood the result of the cases from Lyon vs. Mills, 5 " East., 428, to Kopitoff vs. Wilson, 1 Q., B. D., 377, to be that " under his *implied* warranty of seaworthiness, the ship owner con- " tracts, not merely that he will do his best to make the ship reason- " ably fit, *but that she shall* **really** *be reasonably fit for the voyage.* " Had those cases left any doubt in my mind, it would have been " set at rest by the observations of some of the peers in the opinion " they delivered in the case of Steel vs. State Line, S. S. Co., 3 " App. C., 72."

See, also, Gilroy vs. Price, App. C., 1893, p. 64. Unseaworthiness. Water closet pipe not cased. Cargo of jute. Usual to case.

The Director, 34 Fed. R., 64, DEADY, J.: " The representation " in the charter that the ' Director ' was then ' tight, staunch, strong " and every way fitted for such voyage,' is a warranty to that effect; " and, if the charter was silent on the subject, the law would imply

" as much. **Seaworthiness is a CONDITION PRECE-
" DENT to every charter** or contract of affreightment, and,
" where there is no express warranty to that effect, the law implies
" one.

" The authorities concur in holding that, where there is no
" express agreement to the contrary, the owner warrants the ship
" to be seaworthy, and at the time fit, *in all respects*, to carry the
" cargo described in the contract, to the port or place therein speci-
" fied (Work vs. Leathers, 97 U. S., 379; Wilson vs. Griswold, 9
" Blatchf., 269; The Vesta, 6 Fed. Rep., 532; Davison vs. Von
" Lingen, 113 U. S., 41, 5 Sup. Ct. Rep., 346; The Northern Belle,
" 9 Wall., 526; The Tornado, 108 U. S., 342, 2 Sup. Ct. Rep.,
" 746).

" In Work vs. Leathers, *supra*, Mr. Justice SWAYNE, speaking for
" the Court, says:

" ' Where the owner of a vessel charters her, or offers her for
" ' freight, he is bound to see that she is seaworthy and suitable for
" ' the service in which she is to be employed. *If there be defects,*
" ' **known or not known,** he is not excused.' * * * *And*
" *it matters not whether the master or owners knew of the unseaworthi-*
" *ness of the vessel or not.* They undertook absolutely to furnish in
" the ' Director ' neither a soft or hardwood vessel, but one ' tight,
" staunch, strong, and in every way fitted ' for the contemplated
" voyage; in other words, a first-class wooden vessel. *Their igno-*
" *rance of the fact of her unseaworthiness does not excuse them for a*
" *violation of such undertaking.*

Flanders on Shipping, § 183. " It must be observed, how-
" ever, that there is a fundamental difference between the carrier's
" contract and the contract of insurance. By regarding them as
" standing upon common ground, and governed by common princi-
" ples, a great and radical error is the result, for a breach of war-
" ranty of unseaworthiness in the contract of insurance is not visited
" on the insured as a penalty, but operates to avoid the policy by
" the failure to perform it *as a precedent condition.* But in the con-
" tract for the carriage of goods the seaworthiness of the vessel is an
" implied condition of the contract, *but not a precedent condition,*
" and therefore the want of it does not throw upon the carrier the
" responsibility of an insurer for all losses that may subsequently
" occur, no matter from what causes they proceed."

Note. Here the author falls into an error, which is made mani-
fest when the situation of a charterer who refuses to furnish cargo

to a chartered vessel, on the ground that she is not seaworthy, is considered, or the case of an owner of a vessel suing a charterer for failure to furnish a cargo. The owner of the vessel can hold the charterer liable for such refusal on proof that the vessel was seaworthy, *for the charterer is under no obligation to furnish his cargo to an unseaworthy ship* to carry, and run the risk of a loss, and this shows that the condition of seaworthiness under the charter is a *condition precedent*, and it was so held in the **Director,** 34 F. R., 64; affirmed 36 F. R., 335. See also **Davison vs. Von Lingen,** 113 U.S., 50.

The Vesta, 6 F. R., 532:

Action by charterer against re-charterer of bark "Vesta," who refused to furnish cargo, claiming that the vessel was unseaworthy, as insurance companies would not insure because she was old and built of soft wood.

NELSON, J.: "The charterer was entitled to have the vessel in a "reasonable condition for the carriage of wheat in bulk across the "Atlantic Ocean in the winter months, and if she was not in such "a condition he was not bound to load her * * * p. 534. She "was rejected by the underwriters as an unsafe risk, and on this ac-"count was useless to the charterer for the purpose for which she "was chartered." Libel dismissed.

Premuda vs. Goepel, 23 F. R., 410:

Action against charterer, who refused to load the ship "Podesta" on the ground that she was unseaworthy and that he could get no insurance.

BROWN, J., (p. 412): "Questions of seaworthiness arise mostly "after a loss has happened. *But where a well-grounded suspicion "of unfitness arises before loading, under a warranty of seaworthi-"ness, a merchant is not required to put his cargo on board* **and "run the risk of her foundering,** *before determining whether "the ship is seaworthy or not, or whether the warranty in the charter "party is complied with.*"

Svendsen vs. Stursberg (31 F. R., 86), BENEDICT, J., followed BROWN, J., in Premuda vs. Goepel *(supra)*, and held that charterers were justified in rejecting the vessels saying (p. 87): "The "ship was not put on the dock, nor was such an examination of her "tendered. This omission indicates to my mind, that what was

" visible of the ship afforded just ground for the belief that such an " examination would disclose an unsound bottom." Libel dismissed.

Flanders continues, " A carrier is answerable for the conse- " quence of negligence, not for the *abstract existence* of it. Hence, if " his vessel is not seaworthy, but the cargo is not injured from that " cause, but from a peril of the sea, the carrier is exonerated; if his " delinquency produces no mischief, he is not punishable for it."

Note. The author does not consider whether the owner of the ship must *show* that his vessel was seaworthy in order to avail himself of the *alleged* peril of the sea. It is only a peril of the sea, *to a seaworthy vessel* which exonerates him.

" If his delinquency produces no mischief, he is not punishable " for it."

This is not so.

Stanton vs. Richardson, 7 C. P., 421; Affirmed in 9 C. P., 391 *:

COCKBURN, J.: " The charter party imports an option on the " charterer's part of loading either wet or dry sugar. A cargo of " wet sugar was offered. The captain shipped it, as he was bound " to do.

" He then discovered that the pumps, though fit for the ordi- " nary purposes of the ship, *were inadequate for this cargo*, the " drainage from which, mixing with the ordinary leakage of the " ship, formed a viscous matter which the pumps were unable to " discharge.

" *The ship owner was bound, I think, under this charter party, to* " *have his ship fit to take a cargo of wet sugar, and the ship was un-* " *able to do so. There is, therefore, a breach of the ship owner's en-* " *gagement.*

" It is true he offers, after discharging the cargo, to make the " ship fit to take a cargo of wet sugar, but it is admitted that would

---

* Said to be Affd. in H. of L., Kopitoff vs. Wilson, 1 Q. B. D., 381.

" take him months. In the meantime the cargo had to be sent to " Europe by another ship."

The appeal was in cross-actions, the Court below having given judgment for the charterer in both actions.

7 C. P., 422.

Ship owner sued charterer for refusing to load a full and complete cargo, and neglecting to pay the freight.

Charterer sued ship owner for failure to furnish a seaworthy ship.

It appears by the report in 9 C. P., 391, that the words "tight, staunch and strong" were left out of the description of the vessel, and the only express warranty was that " vessel shall be a good risk " for insurance."

COCKBURN said (391) : " I do not see here that the express war- " ranty necessarily would exclude an implied warranty that the vessel " was seaworthy for the purpose for which she was chartered."

It is obvious that a confusion of ideas has crept in and produced mistaken conclusions. The *negligence* of the carrier in the course of his duty as carrier is not excused by the plea of a sea peril, *if the sea peril would not have occurred* but for such negligence, as for instance, in the case of the Montana, 129 U. S., 409, where the negligence consisted in careless navigation, causing the vessel to be stranded in a fog, or in the case of Bazin vs. S. S. Co., 3 Wall., Jr., 229, where the negligence was similar. The so called *negligence* of the owner *in allowing his vessel to sail in an unseaworthy condition* is of a different kind and quality, and produces different results, and is properly classified under the heading of a breach of the implied or express warranty of seaworthiness.

Transportation Co. vs. Downer. 11 Wall., 129. This was a common law action against the carrier (plaintiff in error) to recover damages for the loss of 84 bags of coffee. The coffee was shipped on the propeller " Buffalo," and the bill of lading exempted the vessel owner from " dangers of navigation." *The testimony showed that the steamer was seaworthy and properly equipped*, but in entering the harbor of Chicago, she touched bottom, and, not answering her helm, got grounded. The defense was a loss by the dangers of navigation.

FIELD, J., said (133) : " On the trial the plaintiff made out a " *prima facie* case by producing the bill of lading showing the re- " ceipt of the coffee by the company in New York, and the contract

" for its transportation to Chicago, and by proving the arrival of the " coffee at the latter place in the propeller " Brooklyn," in a ruined " condition, and the consequent damages sustained. The company " met this *prima facie* case by showing that the loss was occasioned " by one of the dangers of lake navigation. * * * The plaintiff " then introduced testimony to show that this danger, and the con- " sequent loss, *might have been avoided* by the exercise of proper care " and skill on the part of the defendant. * * * The burden of " establishing *such* negligence and inattention rested with the plaintiff. " * * * A presumption of negligence from the simple occurrence " of an accident seldom arises, **except** where the accident proceeds " from an act of such character, that, when due care is taken in its " performance, no injury *ordinarily* ensues from it in similar cases, " or where it is caused by the mismanagement or *misconstruction* of " a thing over which the defendant has immediate control, and for " the management **or construction of which he is re-** " **sponsible."**

Note. Apply these words to the present case. The shipowner has immediate control of his ship, and is responsible for the construction of it. *If it gives way in an unusual manner* under conditions which do not usually cause such constructions to give way, it is obvious that *the inference of misconstruction* must arise, and it must be for the owner to show that there was no fault in its construction.

" The Dangers of the Sea Mutually Expected."

Story on Bailments, § 512*a*: " The phrase, 'perils of the " 'sea,' whether understood in its most limited sense, as importing " a loss by natural accidents peculiar to that element, or whether " understood in its more extended sense, as including inevitable " accidents occurring upon that element, *must still in either case be* " *understood to include such losses only, to goods on board, as are of an* " *extraordinary nature or arise from some irresistible force or from* " *inevitable accident or from overwhelming power* **which cannot** " **be guarded against by the ordinary exertions of** " **human skill and prudence."**

Liverpool S. S. Co. vs. Phenix Ins. Co., 129 U. S., 438:

GRAY, J.: " A policy of insurance against perils of the seas cover " a loss by negligence of the master or the crew, because the insurer

" assumes to indemnify the assured against losses from *particular*
" *perils*, and the assured does not warrant that his servants shall
" use due care to avoid them. But the ordinary contract of a car-
" rier does involve an obligation on his part to use due care and
" skill in navigating the vessel and carrying the goods, and, as is
" everywhere held, *an exception in the bill of lading of perils of the*
" *seas or other specified perils does not excuse him from that obligation,*
" *or exempt him from liability for loss or damage from one of those*
" *perils, to which the negligence of himself or his servants has contri-*
" *buted.*

Illustration.

The ship owner in his charter says : " I will carry your cargo in
" a **staunch** vessel, and if that **staunch** vessel meets perils of
" the sea which that **staunch** vessel cannot overcome then I am
" to be excused for not delivering your cargo to you in the like good
" order as received."

The cargo when delivered is damaged, and the ship owner appears before the cargo owner *(or the Court)* with his excuses, and commences : " Your cargo was damaged by perils of the sea."

Cargo Owner : " Was your ship staunch ? "

Ship Owner : " The sea was very high and swept my vessel's
" deck and got down a hole in the deck where a *bilge-pump plate*
" was placed.

C. O. : " But was the bilge-pump plate securely fastened ? "

S. O. : " I *looked* at it before the vessel sailed and it *looked* all
" right. *To be sure my vessel was* **eleven** *years old and the plate*
" *was secured with brass screws, and verdigris sometimes forms*
" *around brass screws and thus weakens the hold of the wood*—but you
" know that *the Courts presume* that a vessel never wears out or rusts
" out or rots out, and that she always remains seaworthy, so you can't
" make me pay for your cargo, **unless you can prove** that the
" plate, *which you never saw*, except covered with paint on the ship
" (and which is now at the bottom of the sea), was worn out, or that
" the screws, *which you never saw at all* (and which are now at the
" bottom of the sea), were eaten up with verdigris, or that they were
" too small for the screw holes, although they were put in by *my*
" ship-builder eleven years ago, and I have had chances innumerable
" to examine them and you never have had any. *That is the law,*
" *you see,* and you must bear the loss of your cargo yourself, al-

"though you trusted in my warranty and relied upon my as-
"surance that my ship was seaworthy—*only you see I have not got to*
"*prove it.*"

Such is not the law.

THE BURDEN OF PROOF.

Lacombe, J., p. 120: "**The presumption of continu-
"ing seaworthiness** *in respect to this part of the ship is not*
"*rebutted by the single fact that no special test was made as to their*
"*condition.*"

Fie upon your law!
—Merchant of Venice, Act 4, Sc. 1.

"**The Vincennes,**" 3 Ware, 174:

WARE, D. J.: "The owner covenanted that his vessel was tight
"and staunch. And if this is called in question on probable
"grounds, it is incumbent on him to prove it. **He only has the
"means of doing it,** as the ship is in his hands. In the
"matter of the seaworthiness of the ship—especially of the hull—
"**her age is especially to be regarded.**"

The **Niagara,** 21 How., 28:

"Carriers may be answerable for the goods, though no actual
"blame is imputed to them, **and after the damage is es-
"tablished the burden lies upon the respondents** to
"show that it was occasioned *by one of the perils from which they*
"*are exempted* in the contract of shipment or bill of lading."

The **Antoinette C.** 5 Ben., 565:

BLATCHFORD, J.: "The bill of lading acknowledges the receipt
"of bales of empty bags in good order, and contracts for their
"delivery in like good order, the dangers and accidents of the seas
"and navigation excepted. That the bales of bags came out of the
"vessel in a more or less damaged condition is shown. * * *
"*The burden of proof is on the claimant to show that this was a peril*
"*of the sea.*"

The Sch. Reeside, 2 Sum., 574.
Bearse vs. Ropes, 1 Spr., 331.

Woodley vs. Michell, 11 Q. B. D., 47:

BRETT, L. J. (p. 51): "Now, it seems to me that all the plaint-
"iffs had to prove was the non-delivery of their goods at the end of

" the voyage. *The defendants could answer the plaintiffs' case only by* " *showing that they were prevented from delivering the goods by some* " *exemption in the bill of lading.* * * * It excepts perils of the " sea, and *it lay, therefore, upon the defendants*, the ship owner, to " bring the case within that exception."

The Emma Johnson, 1 Sprague, 528.

SPRAGUE, J.: "The respondents are compelled to ascribe the " accident to some inexplicable action of a treacherous element; in " other words, to say that it is one of the mysteries of the sea.

" The **burden of proof is upon the respondents,** and " before they can expect the Court to listen to the suggestion that " the loss arose from inscrutable agency of the elements, **they** " **must, at least, by proof, negative all other causes,** " **and, in particular, they must show by full** " **and satisfactory evidence that the vessel was in** " **good condition, and suitable for the voyage at its** " **inception.** It is always the duty of the owners to provide such " a vessel; it is part of their contract that the vessel, when she " enters upon the voyage, is seaworthy, so as to be suitable for the " undertaking. *It is not sufficient that they honestly believe her to be* " *so.* **She must be so in fact."**

The **"Lydian Monarch,"** 23 Fed. R., 299.

One of the port-holes leaked—no evidence was given as to the method in which it was secured—and it was "*assumed*" by the ship owner that the port was properly secured and that by reason of rough weather the screws worked loose. The Court held that the ship owner had failed to show, *affirmatively*, that the perils of the sea caused the damage.

NIXON, J.: "The only proof we have on the subject is the ordi- " nary presumption that, when one is charged with a duty, he is " supposed to properly perform it."

Inman vs. S. C. Rway. Co., 129 U. S., 128. FULLER, J. (p. 139):

" And as, in case of loss, the *presumption* is against the carrier, " and no attempt was made here to rebut *the presumption*, the de- " fendant's liability, because in fault, must be assumed upon the " evidence before us."

The Shipowner Must Establish the Seaworthiness of his Vessel before he can Claim that the Injuries Arose from a Sea Peril which would Injure a Seaworthy Vessel.

(1) If the shipowner leave it doubtful, either that the vessel was seaworthy or

(2) That the sea peril was of sufficient force to injure a seaworthy vessel, he completely fails to establish his defense.

The **"Lively Yankee,"** Deady, 420: "The *burden of proof* " *is on the respondent* to show that the loss occurred, *as they allege*, " from * * * the perils of navigation. * * * **It is not** " **enough** to show that the vessel encountered adverse winds and " heavy weather, and, *therefore*, the loss *might* have been caused by " these elements."

Lawson on Carriers, § 247: "If, upon the whole case, *it is* " *doubtful whether the loss arose from an excepted cause*, or through " the negligence or want of skill of the carrier, the latter will have " to bear it."

Searles vs. Man. Ry. Co., 101 N. Y., 662:

"When the fact is that the damage claimed in an action was " occasioned by one of two causes, for one of which the defendant is " responsible, and for the other of which he is not responsible, the " plaintiff must fail, if his evidence does not show that the damage " was produced by the former cause. *And he must fail also* **if it** " **is just as probable** *that they were caused by the one as the* " *other*, as the plaintiff is bound to make out his case by the pre- " ponderance of evidence. *The jury must not be left to mere con-* " *jecture.*"

S. P. Taylor vs. City of Yonkers, 105 N. Y., 209.
Hunter vs. N. Y., O. & W. R. R. Co., 116 N. Y., 623.

The Northern Belle, 9 Wall., 530, MILLER, J.: "It is the " duty of the carrier to see that his barge is capable of resisting " these forces" (rubbing on bottom, and impinging on the river shore). "She must be **so tight** that the water will not reach the " cargo. **So strong** that these ordinary applications of external " force will not spring a leak or sink her. **So sound** that she will " carry the cargo in bulk through these ordinary shocks to which

" she must every day be subjected. If she is capable of this she is " seaworthy ; if not, she is unfit for the navigation of the river. No " other test can be given, and this must be determined by the facts " in each particular case."

The **Exe,** 57 F. R., 401, WALLACE, J., C. C. of Ap.: " Undoubt- " edly, in every contract for the carriage of goods there is an *implied* " engagement on the part of the carrier to furnish safe and suitable " means of transportation, and in the case of a carrier by ship to " supply a ship which is not only seaworthy, but is also reasonably " fit to carry the cargo stipulated in the bill of lading.

" It is elementary law that a carrier by vessel cannot escape " liability for the loss or injury of goods during transportation " through dangers of navigation *caused by his own previous default,* " notwithstanding an exception in the bill of lading for liability for " sea perils. So, if the damage to the cargo in the present case, " though immediately caused by a danger of navigation, *would not* " *have been incurred if the steamship had been in a reasonably fit con-* " *dition to resist the escape of water from the ballast tank* into the " hold, the libellant should recover, notwithstanding the exempting " clause."

Judge WALLACE then proceeds to draw a different *inference* from the evidence, saying : " *As no evidence tending to show any original* " *fault in the structure was given,* the *suggestion* that it might have " been originally of faulty construction must be rejected." And, as he had already stated, " *there is no direct evidence about the condition* " *of the stanchion fastenings at the beginning of the voyage, as* " *no special examination of them seems to have been made,*" it is evident that he must either have indulged in a *presumption* that the fastenings were good and sufficient, or considered the *bur-* *den of proving they were not good* to be on the cargo owner, and for that reason reversed the District Court (52 F. R., 155) where Judge BROWN held (p. 156) that " the damage proceeded from either the " original insufficient strength of the stanchion or from its bad con- " dition or bad fastening *at the commencement of the voyage.* For " such defects, either of condition or of original structure *the ship* " *and not the cargo takes the risk,* and to such damage none of the ex- " ceptions of the bill of lading apply."

Hubert vs. Recknagel, 13 F. R., 912 :

A brig, thirteen years old, leaked through decks—rough seas—but no extraordinary peril for season ; and vessel on arrival exhibited

no signs of *general* strain or any *material* loss of spars; and probable causes of imperfections in the deck appearing, the leakage should be ascribed to the *latter causes, notwithstanding general evidence of thorough repair* at the port of departure.

BROWN, J., p. 913: "Having covenanted by the terms of the "charter party that the brig should be 'tight staunch and strong,' "the libellants virtually warranted her *fit to encounter* all the or- "dinary perils of the voyage without damage to the particular cargo "contracted for.

"The leak having occurred through the deck, *the burden of proof* "*is upon the libellant to show that the deck*, **when the brig** "**sailed,** *was fit to withstand* all the ordinary hazards of the voyage "at that season, and that it was free from all latent as well as "visible defects."

The Obligation to Inspect.

The XI. finding (p. 13) is:

"Before the vessel sailed the cap and plate *appeared* to be in "good order, with no indication of looseness. *The examination* "*which was at that time made consisted of such inspection as could* "*be given by the eye;* and to such an inspection they were from time "to time subjected. They were not tested either by unscrewing the "cap or plate or by tapping with a hammer. Tapping with a ham- "mer or unscrewing the cap might have developed any insecurity if "there were any in the bilge-pump plate."

To this finding libellant excepted, so far as it found that the plate "appeared to be in good order," &c. (see II. Exception, p. 19).

Brown, J. (pp. 115, *197*): "They were dangerous unless the "caps and plates to cover them were kept perfectly tight and secure.

"The obligation to keep watch of their condition "was as stringent as the danger from weakness in "them was extreme."

The above *terse* statement of the law is open to no criticism.

It states that an "*obligation*" exists upon the shipowner who offers his vessel to carry property to make the *necessary inspection* to *assure* himself that all is safe, and to examine with the *greatest* care the most *dangerous* parts.

If he has performed this duty he has the means at hands to prove the security of the dangerous places; and, if he has not done so, he shall take the consequences of his failure to do his duty.

Libellant excepted (see XXIII. Exception, p. 21) to the refusal of the Court to find that part of the V. proposed finding (p. 10) as follows: "Such a hole was dangerous unless the caps and plates " were kept perfectly tight and secure."

The Court found a weak and watery paraphrase for this in its VIII. finding (pp. 12, 25), but libellants were entitled to the finding as presented and *undiluted*.

Brown vs. Marshall, 47 Mich., 576, COOLEY, J.: "It is " proper and reasonable that the care required shall be proportion- " ate to the danger involved." (The case was the delivering of a poison in place of a harmless drug.)

Approved in Allen vs. S. S. Co., 132 N. Y., 94.

Inspection—Want of, is Negligence.

The William Branfoot, 52 F. R., 390, C. C. of Ap.:

Libel against the British steamship "William Branfoot" to recover for personal injuries caused by an iron stanchion falling.

FULLER, C. J., at page 392, extracted from the evidence of the mate as follows:

" The mate, in answer to the question whether he had ever made " an examination of the top part of the stanchion, testified: * * * " ' Question. So your examination consisted in standing at the " ' bottom of the stanchion, and looking up casually? Answer. " ' Yes.' * * * The District Court was quite right in holding " that *this was no proof of an inspection*, and that none such was " had. * * * It is true that the floor of the ship covered the " flanges of the stanchions and the bolts fastening them to " the tank; **but the tests of an inspection are not " merely those of eyesight,** and, although the absence " of rivets at the bottom of the stanchion may have been " concealed, it must be assumed that, whether the stanchion was " secure or insecure could have been discovered without involving " tearing up the deck to ascertain, in the first instance, the exact " defects which existed. Taking the evidence together, **the rea- " sonable inference is** that, not only would an inspection have " disclosed the defective condition of the stanchion, but that that " condition was probably known to those having the vessel in " charge. If known, or if knowledge were chargeable, the duty to " repair was obvious."

Compare the above with the **11th** finding (p. 13), where the Circuit Judge says :

" The examination which was made at that time of them *(i. e.,* " the bilge-pump plates) consisted of such inspection as could be " given *by the eye,* and to such an inspection they were from time to " time subjected. *They were not tested either by unscrewing the cap* " *or the plate or by tapping the plate with a hammer.* Tapping with " a hammer or unscrewing the cap might have developed any in- " security (if there were any) in the bilge-pump plate."

The Olympia, 52 F. R., 990 : Steam steering gear.
In re Myers Excur., and Nav. Co., 57 F. R., 241, mast of a barge and fastenings of her deck.

The XIII. Finding and IV., V. and VI. Exceptions.

In this finding the Circuit Judge has attempted to give an account of the circumstances attending the loss of the bilge-pump plate. *It is so manifestly unfair and unsupported by the evidence and a perversion of the evidence,* that counsel has found it necessary to analyze it at length and point out its many errors, and to do so in the most convenient form has again adopted the "deadly parallel."

Before entering upon this analysis the observation is manifestly proper that **whatever happened to the vessel AFTER the loss of the bilge pump plate has no bearing upon the situation at the time of its loss.** It goes without saying that a vessel, which was taking in water through a hole three inches in diameter and pumping it out by her pumps at such a rate of excess of influx over outflow as that in the interval between five A. M., when she had eighteen inches in her, as was ascertained by sounding at that time (p. 30, *59*), and between eight and nine A. M. (p. 48, *88*), when they sounded again and found from *seven to nine feet* of water (26, *50 ;* 32, *61*), was necessarily *sinking deeper and deeper very rapidly,* and was just ready to go down (2d Mate Cahoon, 67, *122*).

As she sank deeper, necessarily she was more exposed to the washing of the seas and the inroads of the waves. As Capt. Lavender said, " she was * * * *settling fast*" (28, *54*). The situa-

tion for the Court to deal with ought to have been confined to the circumstances **preceding** *the finding of water in her*, for as soon as the hole caused by the loss of the bilge-pump plate had been covered up, *the leak was controlled, and in six hours her pumps sucked* (24–*48*). Log January 10 (p. 99): "Pumped **two** hours, "and sound again, and find that we are freeing her very rapidly." All this water would soak into the guano like a sponge, and necessarily add to the dead weight in the vessel, leaving her sunk deeper, even after the leak ceased. This dead weight of water thus soaked into the cargo was estimated at 150 tons (Capt. Lavender, 89, *159*), *which made "heavier weather" (Id., idem); i. e.*, being lower in the water she was so much more exposed to the seas (p. 86, *154½*). "The guano had "been wet, and it settled the vessel more or less in the water, and "*then any little common breeze* she would ship water, and it would "force its way into the cabin afterwards," *outside of what had been pumped out of her* after the closing of the hole, and the pumping did not lighten her much (p. 84, *151*).

Cook, first mate (p. 77): "There was more sea on the deck of the "vessel *because* she had so much water in her. As she settled she "was more exposed to the waves."

Another observation: All references to leaks and damage occurring *after* the loss of her bilge-pump plate are out of place and misleading, and should have been excluded by the Court **from its summarization of the situation at the time of the loss of the bilge-pump plate** for the purpose of ascertaining whether there were sufficient sea perils to have caused this injury to a *seaworthy* vessel.

The Log Book as Evidence.

3. Greenleaf's Evidence, § 428: "It was observed by Lord "STOWELL that the evidence of the log-book is to be received with "jealousy *where it makes for the parties*, as it may have been manu- "factured for the purpose, **but it is evidence of the most "authentic kind against the parties,** because they cannot "be supposed to have given a false representation with a view to "prejudicing themselves."

13th Finding, Page 14.

1. " The next day, the 9th, began with a strong S. E. breeze " which freshened to a strong gale."

The Situation from January 9, 4 P. M., to January 10th, 8 A. M.

2. " Two reefs were made in the main and foresail. At 4 P. M. " the spanker and jib were furled. The middle part of the day " there was a very sharp gale and sea running."

3. " The vessel labored heavily and shipped great quantities of " water; *the pumps were carefully attended to and she was found* " *making considerable water.* The latter part *of the day* the wind " was still increasing and the foresail and forestay sail were furled, " it was *then* blowing a living gale from the westward. The weather " through the night continued to be extremely severe; there was a " terrific gale of wind."

The Evidence and Law.

1. Watson vs. Clark, 1st Dows. (House of Lords, 1813) 345. Lord ELDON said: "Now, though he did not pre- "tend to much skill in nautical matters, yet he had been in a situa- "tion where he had an opportunity of hearing more of the conver- "sation of seamen than perhaps any Judge on the Bench; and, *if he* "*were on board a collier, he should not be much afraid though he* "*heard the seamen talking of fresh gales and squally weather.*"

Wright vs. Orient Ins. Co., 6 Bos., 269:

"It is a matter of almost common knowledge that even the "winds necessary to carry a vessel on her voyage, which are "ordinarily encountered, produce some commotion, and perhaps "enough to terrify a landsman *even by description.*

2. Captain **Lavender,** (p. 88, *158*) "I hove-to that night *just as* "*soon as we could get her under short sails.* I don't know the right "hour; it was before midnight: (23, *46*); the vessel had been lying-to "since ten o'clock at night: (88, *158*); we started, I think, about four "o'clock to *shorten* sail, *and, just as soon as we got the sail short to* "*heave-to, we hove-to.*" **Note**: The vessel was bound to Savannah, and she was "*hove-to,*" obviously to avoid running off her course. Cahoon, 2d Mate, says, p. 46: "We couldn't head our course."

3. Capt. **Lavender** (pp. 23, *46*): "I always make it a practice to try my pumps every two hours; *the pumps were sucking all the* "*time.* They had been tried before that time every two hours." (p. 26). "**There was nothing more but the usual natural** "**leakage of the vessel.** The pumps will suck with four "inches of water in my vessel" (p. 25).

Second Mate **Cahoon** (pp. 47, *87*), examined at the trial, said:

"The mate kept the decks until four o'clock in the morning; "four o'clock he called me. When I came on deck he says to me, "'You better try the pumps pretty often in your watch, because' "says he, 'it is a terrible sea, and,' says he, '*we don't know of course* "'*with this stuff in her*'—that is, *he meant by that it was a hard* "*cargo to carry*—' what time the vessel might spring a leak, it is "'hard to tell.' *I passed along about half an hour (i. e.,* 4:30 A. M.*),* "and then I called the man *off the lookout* on to the poop. *We*

13th Finding, Page 59.

"*pumped a little while, and the pump sucked all right at first.* Next "time we let about fifteen or twenty minutes go past *(i. e.,* 4:50 "A. M.*)* and we tried again, and we pumped and pumped till what "we call four bells (p. 48)—that is, *six o'clock*—and we got no suck, "expecting, of course, every minute to get a suck from the vessel. "*It did not alarm me a great deal, so that I did not call the watch;* "*did not call anybody, or tell anybody about it.* * * * During "the run of this time, the captain was on deck once in a while, and "at five o'clock I sounded the pump. The captain sounded him- "self, and that was not half an hour after we had a suck, and there "was eighteen inches of water. *Of course it did not alarm him* "*a great deal. He went below again.* At six o'clock (four bells) "he came up again and asked me if the pump had been sucked. "I told him no, that the pump was not sucked, *but didn't amount to* "*much*, or anything like that, so he went below again. * * * At "eight bells *(i. e.,* 8 A. M.*)*, when all hands came on deck, the first "thing we done was to go to work to pump her out, and we didn't "get no suck. Presently *after this* the Captain sounded again and "we had seven feet of water in the vessel."

Peterson, the steward (55, *101*), examined at the time of the trial: "About four o'clock I was called out to make a fire; so, "*after four o'clock* I tried to make a fire and got the breakfast "ready (56, *103*). I slept in the cabin. When I came into the "galley I lit the fire that morning. The stove was not quite one "foot above the level of the deck. I kept the fire burning until 10 "*(i. e.,* after the vessel was filled with water*)*. Water put it out then "(55, *101*), *After breakfast it got deeper in the water all the time.* "So, it got so much water in the galley I could not keep a fire any "longer (56, *103*). I got breakfast that morning, *cooked it on the* "*stove and served it in the cabin*, and in the forecastle both. I got "breakfast ready about half-past seven. *I got it into the cabin by* "*carrying it in a basket from the galley to the poop. I did it by* "*walking along the deck.* I cleared away the breakfast about 8 and "carried the baskets back to the galley. I got the forecastle break- "fast about the same time. The men took their breakfast in the "forecastle house (57, *104*). I handed it to the men from the galley "into the forecastle (56, *103*), right through the partition—a hole "from the galley into the forecastle."

Second Mate **Cahoon** (68): "The first watch that was below of

13th Finding. Page 59.

4. " Planks were carried away from the bulwarks of the **star-**
" **board** side of the vessel."

5. " Also one of the ports."

" course got their breakfast, eating it in a great hurry. We was callled " *(i. e.,* to breakfast*)* at seven bells--that is half-past seven. I don't " remember getting my breakfast that morning ; only going into the " cabin and catching up a mug of coffee and eating a piece of bread " between half-past seven and eight o'clock."

4. Note. There is no entry in the log (p. 99) or protest (p. 107) of this alleged loss of bulwarks (Lavender, p. 31).

Second Mate **Cahoon** says (53, *98*) : " Pieces of the bulwarks " *just forward of the break of the poop on the starboard* side were " carried away right over where the scupper went through." (54–*99*) : **" These pieces of the bulwark were broken when we " was waterlogged,** *while we were getting the water out of her.* **" When she had the seven feet of water in her she was " level with the water—right level all over,** with the ex- " ception of aft. There she was a little more out of water, *but for-* " *ward would come every* **little** *wash right over the nighthead.*" And this is theonly evidence as to the *time* the bulwarks were broken. And Cahoon, at pages 53, *98*, speaks of the longest piece broken off them being seven feet, and that *that* was picked up and *spiked on by the mate and himself.*

5. Capt. **Lavender** says (32, *61*) : " The water that came on " our main deck went off through the scuppers and *through the port.* " *The port through which it had to go was a foot square. It was* " *washed away.* There were **two**—one on each side. *They were* " *situated right at the break of the poop.*" (One of them was) " right " over the bilge plate."

Note. There is no evidence that the port which was lost was on the *port* side, but, inasmuch as all the damage to the bulwark was on the starboard side and *just forward of the break of the poop on the starboard side,* which is the exact locality where this port was situated (Second Mate Cahoon, 53, *98*), the natural conclusion would be that it was the *starboard port* which went with the pieces of the *starboard* bulwark.

Cahoon says (52) : " There was no repairs made to the vessel " in Savannah, with the exception of putting some new stuff over the " hole we are speaking of. The mate and myself did that." And the same testimony is given by Lavender (pp. 31, *60 ;* 27).

13th Finding, Page 59.

6. " The waterway on the starboard side was started off."

7. " The covers of the chain locker and"

The Evidence and Law.

6. It is quite evident that starting of the water-way on the starboard side was a very insignificant affair. *It is not noted in the log.* It was attempted to explain *this want of repairs at Savannah* by the extraordinary suggestion made by the expert Candage, examined for the claimants in the Circuit Court (109): "That a good, staunch "vessel *recovers* to some extent when relieved of the straining "and cargo and in port for a few days, at rest" (113, *192*). How many *rests* of this description, *without repairs*, would lead to a vessel's sinking does not require much calculation.

The next cargo this vessel carried was loaded at Bull River, and was 745 tons (103) of phosphate rock (29, *57*), "the hardest cargo a "vessel can carry" *(idem)*, and so says Candage (113, *192*), *and yet without any repairs* to the "Morrison" she carried the cargo with the sea running heavily and the vessel laboring heavily (Log, Feb. 28th, 104, *179*), without trouble or difficulty (Peterson, 55, *102*).

7. Second, Mate **Cahoon** says that (46, *84*): "The coal-bunkers "were just abaft the windlass, forward of the forehouse. The "chainlockers (46) were a square box * * * one on each side, "and in the middle was a coal-bunker. * * * The covers were "made of two-inch plank, and then crossed right close together, "and that would make one of them very probably 100 pounds— "*water-soaked* and all that. There were two of those, and between "them was the other cover" (of the coal-bunker) "which was sta- "tionary. The two were eight feet long and about two and a half "feet wide. *They were not put on by hinges; they were just set in.* "They washed off. * * *

"I picked up one of them covers on deck against the break of "the poop of this pump of the port. It fetched up against the "break of the poop, and there it was lying (47, *86*), *two feet* from "the hole where this plate goes on. **I saw those when they "were washed off;** picked them up myself; *it was just getting "daylight.*" At page 53, *97*, Cahoon says: "The covers of the "chain lockers washed off several times; **the first time was "about six o'clock in the morning,"** and he identifies this time by being the occasion when the man at the wheel relieved the man on the lookout, which all navigators know is in the middle of the watch, or after two hours of wheel and two hours of lookout.

13th Finding, Page 59.

8. " a spar were found loose in the morning floating in the waist " of the vessel on both sides."

And he also says that **it was just getting daylight. "I saw "those covers when they washed off"** (53, *97*).

Note. Judge BROWN says (117, *201*), commenting on this evidence: "But, as this was, as he said, *a little after daylight*, it must "have been nearer six o'clock than five. This cover, he says, was of "wood, *and waterlogged*. If so, its edges could scarcely be suffi- "ciently hard to knock off a plate properly secured, having only "from one to two-eighths of an inch of perpendicular surface."

Obviously, if he **saw** them **when** they washed off (and it was after six o'clock, and after daylight—which, in the month of January, is certainly after six o'clock), it is clear that they could not have caused the loss of the bilge-pump plate, which had happened *at least* an hour earlier, for it was five o'clock when Lavender said he sounded and found eighteen inches (30, *59*), and it was then *before* daylight (23).

8. As to the spar, no entry was made in the log, or mention in the protest, of the spar, which was found loose, *nor was it developed as a fact for nearly four years after the deposition of Capt. Lavender had been taken, in 1884* (22), nor for nearly two years after the opinion of Judge BROWN had been filed. Mate Cook, on his examination in December, 1887 (75, *135*), introduced the spar incident. He says (p. 76): "The gaff was lashed on the port side; *it couldn't get across* "*the deck any way*. It was a spar about 38 or 40 feet long, and 10 "inches, at the biggest part, in diameter, and had been lashed in the "port waist on the main deck. I don't know when that got loose; "I first observed it Thursday morning." And at page 82, *148*, he says he could not tell how long the spar had been lashed in the position he described; and at page 83, *150*, he says that there was everything to *indicate* that it was properly lashed; that it broke afterward in taking sugar out in Cuba, by reason of its rottenness. It was not lost in this voyage.

Comment. It is obvious that this spar could not, by any possibility, have reached the bilge-pump plate or cap. First, it was round; second, it was rotten; and third, it was too long to get across the deck; and fourth, the bilge-pump plate and cap was inserted *close to the bulwark*, and, necessarily, between the stanchions (53, 98), and this spar could, by no possibility, have reached it, and no one pretends that it did.

13th Finding, Page 59.

9. " Coal washed about decks, also buckets and bucket racks ; " also *pieces of bulwark.*"

10. " The forecastle door and galley door were washed off " but were not lost."

11. " The men could not stand at pump on main deck because " it was continually swept by the seas, and it was with difficulty that " they were able to work at the pump on the poop-deck, which was " about four and a half feet higher than the main deck, on account " of the sea breaking over."

The Evidence and Law.

9. As has been shown by Cahoon (Testimony 54, *99*), "these pieces " of bulwark were broken off *when we was waterlogged*, while we was " getting the water out of her," and at page 46 he described the coal bunker as located between the chain boxes, with a *cover* which was stationary and " a *door* on hinges to lift up and take the coal " out of the locker." Manifestly, the coal that washed out came through this *door*, which, any one who has ever seen a coal bunker knows, was at the bottom of the coal bunker, for there is no mention of the *cover* of the coal bunker ever coming off, which it could not do unless the hinges broke.

10. The log under date of January 12th (99, *174*), two days after this occurrence, mentions the washing off of the forecastle door. No mention of this is made in any entry in the log of January 10th (98, *173*), and at page 30 Capt. Lavender says that entry was right ; and at page 25 that the entries were always *accurate*. And Cook (examined in December, 1887), who was the man who kept the log (80, *144*) says (82) that if the log contained an entry, that would be more reliable than his memory. Cahoon says (54, *69*) he could not fix the date when the forecastle and galley doors were carried away.

Peterson says (55, *101*) he found that the *galley* door was *out* at 4 o'clock in the morning. And at page 56 says : " The galley door " was a *sliding* door—not on a hinge—and slides over to port. The " rail that it slides on is outside the galley with nothing to hold it " in position except two string pieces. * * * It could not slide " back and out of its place. *There is a little piece on the corner—a* " *little batten which prevents that. If the door opened with a bang,* " *very likely it would knock that batten off.*" Cahoon says (47, *86*) " the galley door was so it could be repaired again."

11. Log, January 10th (98, *173*) : " Find that the vessel is mak- " ing water faster than we can pump it with **both** pumps." There was added to this an entry in pencil by the notary at Savannah who prepared the protest (p. 99) : " The men not being able to work at " pumping steadily because of heavy seas sweeping her decks." Capt. Lavender testified that this addition to the log was made by the notary, with his sanction (27). Lavender (31) says that they were working the diaphragm pump (see as to pumps, p. 23) on the poop deck, when they discovered the eighteen inches of water, and

13th Finding, Page 59.

12. " *Before midnight* the vessel was hove to under a storm try-
" sail, two-reefed foresail and forestay-sail on the port tack."

that they freed the vessel with *one* pump; that they could not go to the other pump. He also says (p. 23) that the second mate and another sailor were at the pump at the time " and Cahoon, the second mate, says (48, *87*) that he *called the man* " *off the lookout onto the poop at about half-past four to pump*, and " then they pumped a *little while*, and the pump sucked right " enough, and twenty minutes later (48) when they pumped again " they got no suck, but, as it did not alarm him, he did not call the " watch or any one, and mate Cook says (p. 84, *151*): 'The one on " 'the poop deck is considered the best pump.'

"The reason why the pump on the main deck was not used is here made evident. Cahoon (the second mate) the man at the wheel (never examined as a witness), and the man on the lookout (who was not called), who assisted the second mate at pumping, were all the men in *that* watch. (See 6th Finding, p. 12. Her crew consisted of master, first mate, second mate, steward and *four* sailors). This is obvious, because otherwise the man on the lookout would not have been taken from that duty, and the man at the wheel could not be. That they could and did pump on the *main* deck, after all hands came up is shown by the testimony of Cahoon (p. 54, *100*)," "the men stood on the main deck pumping " after 10 o'clock. Then she had seven feet of water in her, and " then, as he says (54, 99), every little wash of the sea came over her because she was then so deep, she was level with the water and **Cook** says (p. 81) that they could not use the pump on the main deck *all the time*, and at page 77 that, *though the wind had abated*, *there was* **not much difference in the sea.**

12. The log under date of January 9th (98, *173*), shows that in the latter part of that day the *foresail* and *fore-staysail* were *furled*, and the same log under date of January 10th (*id. idem.*), shows that the " two reefed *foresail* and *storm-trysail*" were set at 8 A. M.

The above extracts show the inexactness of the Court in preparing this finding. Capt. Lavender testified (23, *46*) the vessel had been lying to since 10 o'clock at night and, (p. 23), " at the time I " sounded, *before* daylight, we were on the port tack," and at page 28 " we were lying to under a two-reef *mainsail* and fore-staysail." So that out of the three sails mentioned in the finding, the *fore-*

13th Finding, Page 59.

staysail was the only correct one. The finding is not material, but the carelessness is.

Capt. Lavender further testified (23, *46*) that at about half-past five he discovered the pumps would not *suck* and he " kept her *off*" to free the pumps. * * * " I got her before the " wind in order to stand at the pump, and when she was before the " wind she had a list to port. Her *booms* were at that time on the " *port* side, and she continued with her booms on that side until 10 " or 11 o'clock. Then we *wore* ship. We were *hove to* when we " discovered the holes. The wind was in the same direction. As " we wore ship the vessel did not right up *at once*. When she " righted up that brought her *portside* out of the water. Then it " was between 10 and 11 o'clock. The righting up of the vessel " was caused by wearing ship, the booms coming off on the other " side."

Note. Four different periods of time, four different conditions of action, are here detailed, and it is from failing to distinguish between them that the Circuit Court has made the error it has.

First period. From about ten P. M. of January 9th until about five A. M. of January 10th, the schooner lay *hove to* on the port tack, under her two reef *mainsail* and forestaysail, and being on the *port tack* she had necessarily *a list to starboard*, and it was during this period that the pumps were tried at about half-past four and then sucked, after a little pumping (Cahoon, 47, *87*), and were tried again twenty minutes later, or at ten minutes of five, and would not suck (Cahoon, 48), and it was from the fact that they would not suck that the captain wore her around and got her *before the wind.*

He says: " What induced me to try the pump at that time was " that they pumped longer than I ever knew them to pump before " (23, *46*).

Captain Lavender says (28, *54*) : " The reason why I sounded * " the pumps at five o'clock was because I thought they had been " pumping longer than they ever did before, and I thought something " must be wrong. *I got her before the wind* in order to stand at the

---

* NOTE. The nautical difference between *pumping* ship and *sounding* the pumps must be borne in mind.

13th Finding. Page 59.

"pump, and when she was before the wind she had a list to port." Captain Lavender says (23, *46*): "When I found the seven feet of "water in the hold, *we were running free with the wind on the star-"board quarter.*"

Note.—Lying to, on the port tack with the wind southward and westward, as Lavender says (23) (or S. W. or S. W. by W., as Cahoon says [52, *96*]), and headed *into the wind, as near as she could*, as Lavender says (89), the schooner must have been heading within three to four points of the wind, or about W. or W. S. W., with the wind on her *port* side and her booms on the starboard side,* and necessarily with *a list to starboard*. It was while in this situation with this *list to starboard*, which was the situation when "the "pumps could not get a suck" *that the bilge-pump plate must have gone* **because they did get a suck after the bilge plate hole was stopped up.** The thing which puzzled Judge LACOMBE has yet to be accounted for. He says (120, *207*): "*It is indeed hard to conceive by what casualty the plate could have* "*been removed while the water-way in which it was fastened was* "*still on the* **weather** *side.*" Of course the weather side was the *port* side while the vessel lay hove to on the port tack, and in the port waterway was the bilge-pump plate which was lost.

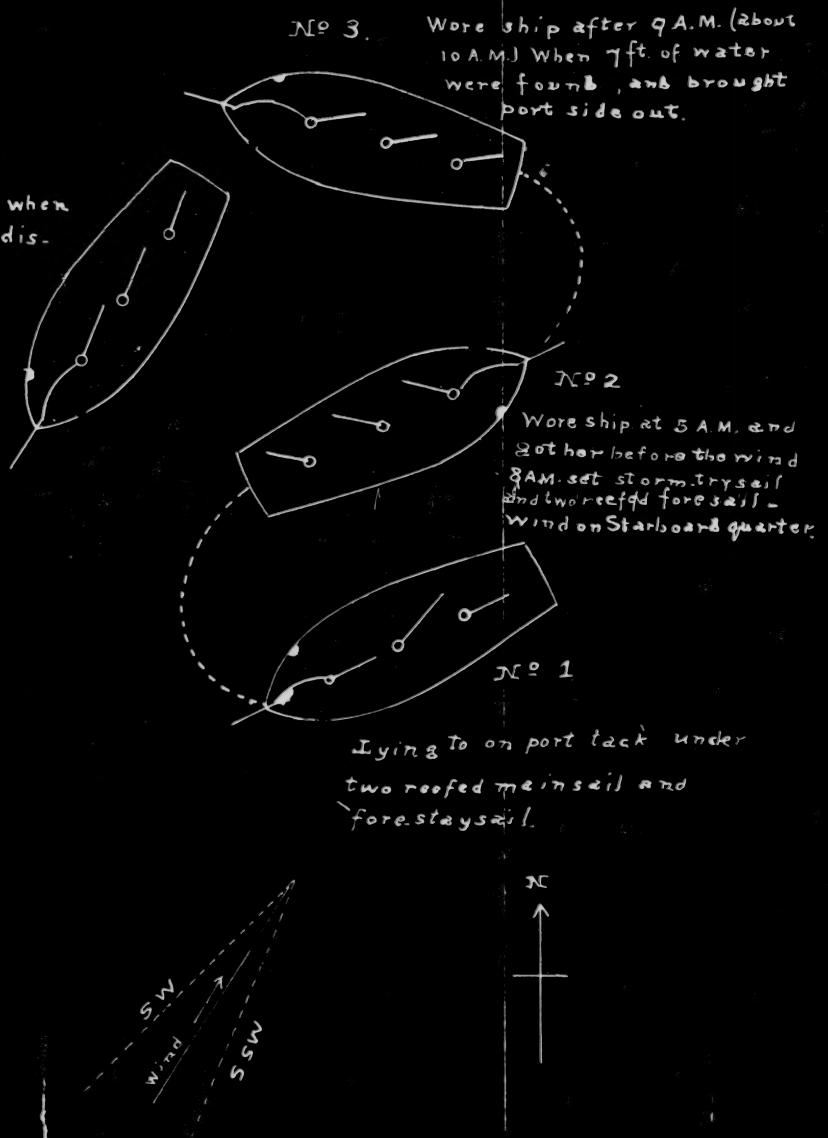
Second Period. From about 5 A. M. till 9 A. M. the vessel was running before the wind with the wind on her starboard quarter, and, to get there, as she wore ship instead of tacking, and as the wind was southerly and westerly, she must have come around to the west northward and eastward, until she headed somewhere about east, or E. by N., and on this heading, *running before the wind* with the wind on her starboard quarter, she must have had a list to port, causing the port-bilge-pump-plate to lie under water, if she listed sufficiently. At 8 o'clock A. M. the log (98) shows that the two-reef-foresail and storm trysail were set, and at this time she must have had on her her forestaysail, her two-reefed-foresail, her two-reefed-mainsail and her storm-trysail, which Captain Lavendar says (89) was set on the mizzenmast. The vessel carried only ten sails in all—a spanker, a mainsail, foresail, forestaysail, jib, flying jib, outer jib, foretopsail

---

* Cook says (76, *137*) when on the starboard tack the booms were *necessarily* on the port side, and with the port tack the reverse must be true.

13th Finding, Page 59.

13. " The vessel was shipping water through the cabin windows " doors and down the booby hatch. The cabin was situated in the " after part of the poop deck. The top of the cabin house was " about three and a half feet above the deck. They commenced to " take water in the cabin while eating supper, and all through the " night it forced its way in. This was unusual and indicated very " bad weather and a rough sea. Everything in the cabin was " drenched, excepting the berths, with water washing around the " cabin with motion of vessel. Water reached the cargo during the " night through the cabin, a strained waterway and otherwise."


№ 3.
Wore ship after 9 A.M. (about 10 A.M.) When 7 ft. of water were found, and brought port side out.
№ 4
Hove to when hole was discovered.
№ 2
Wore ship at 5 A.M. and got her before the wind 8 A.M. set storm trysail and two reefed foresail — Wind on Starboard quarter.
№ 1
Lying to on port tack under two reefed mainsail and fore staysail.
SW
Wind
SSW
N

maintopsail and mizzentopsail (6th Finding, p. 12; Lavender, 27, *53*). She continued running *before the wind* down to ten or eleven o'clock. Then they wore ship again (Lavender, 24).

Third Period. 10 A. M. Inasmuch as she had been heading east with a southerly and westerly wind *on her starboard quarter*, when she again *wore* ship she must have come around again by the northward and westward until she got headed westerly, with the wind on her *port* side, her booms on her starboard side and a *list to starboard*, which would bring her port side out of water. This is what Captain Lavendar says occurred (24, *47*). The vessel at that time had the seven feet of water in her (Cahoon, 48, *78*), and of course was sluggish in her movements, and as she was awash, or *level with the sea*, and every little swell coming on her deck (Cahoon, 53, *99*), her decks were flooded, and it is entirely credible that it took from twenty minutes to a half hour after the second wearing of the ship before the decks became so far clear that they could see the port side. Lavender says (28, *54*), then this hole was discovered, and it appears by Lavender they were (24, *47*) *hove-to* (*i. e.*, for the second time) when the hole was discovered.

Fourth Period. This is the time that they were hove-to, as Capt. Lavendar says (28, *55*), under two-reef foresail, storm-trysail and fore-staysail. He also adds, the wind had then abated *(see diagram)*.

13. "The log shows that on January 7th (page 98), three days prior, the vessel was *on her course* (under a two-reef main and foresail, topsails, spanker and flying jib being furled). (Note.—The vessel also had on her forestaysail, jib and outer jib (see p. 27, *53*), and that *at this time*, there being a strong northwest gale, the vessel was laboring heavily and shipping large quantities of water from all parts, *water entered the cabin and forecastle, wetting bedclothes and washing everything moveable about.*

The suggestion of the water coming into the cabin on the night of the 9th–10th January never *originated* until after the decision of the District Judge (in March, 1886). *It is not noted in the log, it is not mentioned by the first mate, Cook*, who was examined on December 1st, 1887 (75, *135*), and it was reserved for Capt. Lavender, *when he was recalled on December 28th, 1887, and for his wife, who was first examined on February 2d, 1888*, to tell about

13th Finding, page 59.

14. " The pumps were tried every two hours, and by four " o'clock Thursday morning it was discovered by the pumps *bring-* " *ing up guano with the water*, that the cargo was wet."

the water getting in the cabin, and their stories do not harmonize. He says (87, *156*) the water that came down the cabin came in both the after and forward gangway. It came sometimes when a sea would strike it with much force, *a bucketful* or more, and then it would *dribble* after that. And (p. 88, *157*) he says *it was not while they were lying-to the first time (i. e.*, from ten P. M., January 9th, to five A. M, January 10th*)*, that the water came in the cabin. He also states that there was a canvas over the floor of the cabin, that there was a hole to let the water through the floor, and that the water would run off the canvas and down through the hole (87, *156*). That hole was in the port forward *corner* of the cabin and was left open *when no cargo was under it.* When there was cargo under it, it was plugged up. *He doesn't remember whether it was plugged up on this night*; that (87, *156*) the water went down through the seams as well, which were slack. He did not know when this cabin floor had been caulked; he could not swear (88, *157*) that it was tight; that it was hard pine deck, and that he could not keep it perfectly tight, although it was apparently tight when *new*-caulked. That there was no pipe connected with this hole to carry the water away, so that it would not hurt the cargo below, and (88, *157*) *there was cargo under this cabin.* And at 91, *162*, he says there was *a little water.* Mrs. Lavender says (91, *163*) that the water got in the cabin in sufficient quantities to swash around with the motion of the vessel. And adds that there was *a great deal* of water in the cabin (92, *165*). On the face of the entry in the log it is plain that the water entering the cabin occurred on the 7th of January, and the witnesses have obviously confused that occurrence with a later date; but as the vessel had no pipe to carry the cabin water away from the cargo she is clearly liable for that injury; and, as her cabin decks were obviously not tight and had not been caulked for four years (Lavender, 88, *157*), she was unseaworthy in this particular.

14. *There is nothing in the log or the protest bearing on this statement* and it is obviously an afterthought, for it was not testified to by Lavender when his deposition was taken in March, 1884, nor by Cahoon, the second mate, on the trial; nor by Cook, the first mate; who, when examined on December 1st, 1887, said (p. 84, *151*): "Q. "Did you pump up a lot of this stuff (guano) with the water that

13th Finding, Page 59.

15. "The master of the vessel did not go to bed during the "night but was mostly on deck."

16. "Previous to 4:30 o'clock in the morning they were able to "get a suck on the pump, indicating that there was no water then "in the well, but after that they were unable to do so. At this "time the weather was very bad, a very bad sea flooding the decks "continu ally, and washing everything moveable about."

"About six o'clock they sounded and found 18 inches of water "in the well. In about half an hour *afterwards* they wore ship, "putting the vessel before the wind"

17. so that the men could stand at "the pumps."

" came out ? A. The water was all black. It would have been black " all the same *if there wasn't any guano in it.* On a coal vessel the " water is always black ; " and at page 78 : " We carried coal most of " the time ; " and Atwood says (p. 44, *81)* they get their bilges full of coal dust. It remained for Captain Lavender, the master and a part owner, to testify (89, *159)* to this occurrence, when re-examined on the 28th of December, 1887.

15. Lavender states (23, *46)* : " I had been on deck all night, *off and on.*" **Cahoon,** the second mate, says (46, *87)* that he received his orders from Cook, the first mate, and at page 48, *88* : " During the run of this time the captain was on deck *once in a* " *while ;* that at 5 o'clock the captain sounded and there was " 18 inches of water ; *of course it did not alarm him a great deal ;* " *he went below again.* At 6 o'clock (four bells) he came up again, " I told him that the pump was not sucked, but did not amount to " much, *so he went below.*"

16. All of this portion of the finding has been commented upon in the previous statement and the only additional comment to be made is as to the statement " that *afterwards (i. e., after* finding eighteen " inches of water in the well*)* they wore ship." This is obviously incorrect, for Captain **Lavender** (23, *46)* says : " At the time I dis- " covered the eighteen inches *the vessel had a port list,* a two streak " list." To have a port list the vessel must have been on the star- board track, *and so says Lavender* (p. 28, *54*), and as she was lying-to on the port track it is quite apparent that the discovery of the eighteen inches of water was *after* they had wore ship.

17. Cahoon says (47, *87)* : " We could not pump on the *main* " deck, you understand ; there was too much water, and the water " coming forward and coming against the break of the poop we could " not get there, and we had to tie ourselves to a hatch or the rings of " a hatch then to stay there—that is, *we had to tie the pump brake,* " because if we got washed from that pump-brake and let go, *that* " would go overboard, but we had a line we could reach ourselves if " the sea struck us and save ourselves, but if we let go the pump- " brake *it* would go overboard, *so we tied a string to it.*"

13th Finding, Page 59.

18. " The only outlets on the port side for the seas that came " aboard were the open port above mentioned and the scuppers."

" They continued pumping but were still unable to get a suck, " and at nine o'clock soundings showed about seven feet of water in " the vessel. Preparations were then made to abandon the vessel as " she was supposed to be sinking, the lashings of the boat on the " poop deck were cut and the women on board came up from the " cabin to take the boat. Between 10 and 11 o'clock they wore " ship and the vessel slowly righted up, the boom swinging from the " port to the starboard side, bringing the port side out of the " water."

" The vessel was then working heavily in the sea, losing steerage " way, and settling fast."

19. " When the vessel righted up and rolled her side out of the " water the second mate, who with others *fastened with lines* to pre- " vent them from being wash d away, was working at the pump on " the main deck, heard a heavy gurgling sound and let go the pump " and went over to the port side, put his hand against the rail and " looked down under it to where the blige-pump plate was, and saw " a hole large enough to put his hand in. He ran his hand and " arm down the hole and sung out to the captain, ' look here.' Being " greatly excited; and not looking for such a thing he hardly " realized what the trouble was. The captain came and said ' My " ' God! this is the bilge-pump.' It was found that the whole bilge- " pump plate with the screws was gone."

The Evidence and Law.

Cook says (p. 84, *151*) : "The one on the poop deck is considered "the best pump," and (p. 81) "The pump on the main deck we "couldn't pump *at all times.*"

18. The Court uses the expression "open port *(singular num-* "*ber)* above mentioned," overlooking the fact that the vessel had a port on *each* side, which Captain Lavendar testified were about a foot square (32, *61*).

19. See above (No. 17) extract from Cahoon's testimony where he says they "*tied the pump-brake.*"

SOME MINOR DISCREPANCIES.

The witnesses attempted to account for the water in the vessel by *a hole in the lead scupper pipe* on the starboard side and by *a hole in the mast coating*. Unfortunately, the log does not bear them out. The testimony was, that after this hole, where the bilge-plate had been, had been stopped up and the vessel pumped out, **a thorough examination was made.**

Capt. **Lavender** says (30, *58*): "Q. But the next day, didn't "you? A. We made a thorough examination so far as we could; "examined around the mast so far as we could. There was no evi- "dence of any leakage then around the mast that we could see. "I think there was a little hole in the coating **and we sewed it** "**up.** Q. I read from the log **January 15th,** 'Found that the "wedges around the main mast had 'started up and made a hole in "'the coating, causing a leak; drove the wedges down solid.' Was "there any other hole closed up around the mast? A. No, sir.' **The log** for January 15th shows the above entry (p. 100).

Cook, the first officer, when examined in December, 1887, speaks of this hole in the mast-coating (79, *143*), and (p. 77, *139*) he states that he went into the between decks *the next day* after the loss of the bilge-pump plate and found a lot of water there which had gone down around the mast through *a hole, bursting the mast-coating* by the wedges starting around the main-mast, but when he was shown the log and the entry of the 15th of January (82) he admitted that he did not remember when it was (84, *162*).

The Scupper. Capt. **Lavender** testified (30) that he thought the hole in the scupper was discovered the next morning; that it was in the centre of the pipe *on the lower side*—an inch hole. The **log** shows that on **January 12th** (99, *174*), the hole in the scupper was found, and the evidence of **Roosevelt** (34, *65*) is that such hole was often caused *by punching a bar through to clear the pipe* when it gets obstructed, and Capt. Morton (37, *70*) has known such things to occur repeatedly.

Thurlow (p. 59, *109*), speaking of the scuppers having holes in them says: "I presume it might be made with a crowbar or hand "spike in getting stuff, which generally gets into the scupper quite "often."

Atwood (66, *120*) says: "The scupper might be punched. "Sometimes the scruppers get stopped up with anything and we "shove the dirt out."

THE OVERLOADING OF THE SCHOONER.

The Circuit Judge found that the vessel was not overloaded (5th Finding, p. 12). Libellants excepted (see I., p. 19). **Judge Brown** (117) said: "The schooner on this voyage was "also *loaded deep*, as the evidence clearly showed. The second "mate so states explicitly. She may not have been loaded so deep "as to be unseaworthy in this respect, but *she was loaded deeper than* "*is usual or prudent for the winter season.*"

Note. Imprudence and unusual loading would seem to constitute unseaworthiness in that respect.

On a rehearing Judge BROWN said (119): "Upon one point I am "satisfied that the evidence of the second mate was misunder-"stood; namely, in reference to the schooner's being loaded deeper "than usual. I think that passage refers to a previous voyage." **Judge Lacombe** says (120, *206*): "That the vessel was not un-"seaworthy by reason of overloading *(a fault not charged in the* "*libel)* seems to have been the conclusion finally reached by the "District Court upon the rehearing. Such a conclusion is accord-"ant with the testimony."

Comment. Why Judge LACOMBE should remark that the fault of unseaworthiness by reason of overloading *was not charged in the libel*, can only be inferred from the view he took that the *burden of proving unseaworthiness in respect to overloading*, as in all other respects, was upon the libellants, which has been demonstrated to have been an error.

The Facts as to Overloading.

The schooner sailed from Weymouth loaded with 756 long tons of guano (3d Finding, Lavender, pp. 22, *45*). She then drew 16 feet 10 inches aft and 15 feet 6 inches forward (Log, Jany. 2, p. 97, *172*). Lavender says 16 feet 7 inches (p. 23). Cook says (p. 84, *151*) she was 16 to 18 inches by the stern.

The log entries would give her 16.2 inches on an even keel.

This was the *deepest* draft of which there is any *record*. The log gives the draft of two other voyages—*i. e.*, December 7, 1883, Charleston to Boston, draft 14 feet 4 inches aft, 14 feet 2 inches forward (Log, Dec. 7, p. 95), or, on an even keel, 14 feet 2 inches; and on February 23, 1884, Bull River to New York, 745 tons; 16

feet 6 inches aft, 15 feet forward (Log, Feby. 12 to 23, p. 103, *178*), or, on an even keel, 15 feet 9 inches, or five inches less than on the voyage to Savannah.

What Freeboard Was Necessary.

Captain **Lavender** says (p. 23): "I had four and a half feet of "freeboard opposite the main hatch, and from the water level to the "main deck. **I never measured.**"

Second Mate **Cahoon** said: "I wouldn't say she had four feet "freeboard. I will say *three and a half*" (p. 54, *100*).

Atwood, her managing owner, said (p. 42, *78*): "*With four feet* "*of freeboard*, I wouldn't consider her overloaded."

Captain **Morton** (expert) says (p. 38, *71*): "The rule is about "three inches for each foot depth of hold for freeboard. That would "make four feet freeboard for this vessel." (*Note*, Atwood says [p. 42, *78*]: "*That is the proper rule.*")

Measurements.

Atwood, who contracted for and saw the schooner built (p. 40, *75*), says she was "ten feet in the lower hold and six feet between "decks." Capt. Lavender says (p. 31): "The depth of hold of the "'Morrison' is sixteen feet."

It is obvious that, as she drew sixteen feet two inches on a level keel, if she had four feet of freeboard, she had at least twenty feet two inches of perpendicular depth at the main watch from the under side of the keel up to the main deck.

But, as she had sixteen feet of hold, she must have had four feet or forty-eight inches below the floor (or ceiling) to the under side of her keel. But Atwood says, after figuring on the thickness of her ceiling, her timbers, her keel, her garboard streak, and making it all as *large* as he could, that she only had thirty-five inches (p. 43, *80*), which he afterwards (p. 65, *119*) increased to thirty-nine inches.

Note. Capt. Lavender says (p. 25): "I should judge the frames "were eight inches thick at the bottom; I think that is pretty "heavy timber." While Atwood says (p. 43) "she is twelve to "fourteen inches deep—her floor timbers—so between the ceiling "and the outside would be just that difference."

Taking Atwood's largest figures, and there is only thirty-nine

inches, or three feet three inches, to add to her sixteen feet depth of hold to make up the twenty feet two inches, and it runs short eleven inches. Besides, these measurements are made directly over the keel, and the *crown* or curve of the deck must come off to get at the height *at the side*.

Capt. Morton said (p. 38, *71*): "There is a crown on the deck "of the vessel running athwart-ship; a vessel of thirty-three feet "breadth of beam (Lavender, p. 31) *would have four inches*. That "crown brings the side lower than the centre of the vessel."

So that *at the side* there would be four inches less of perpendicular height from the level of the keel to the level of the deck *there*, or only eighteen feet eleven inches; and deducting her draft of sixteen feet two inches, **she could not have had more than two feet nine inches of freeboard** (see Morton, p. 38).

Judge Brown, on a rehearing, thought (p. 119) he misunderstood Cahoon "in reference to the schooner being loaded deeper "than usual."

He did not misunderstand him. The log (as above shown, p. 61) shows she was located deeper than on any previous voyage, and Cahoon testified (pp. 48, *88*): "Presently after this the captain "sounded again and we had seven feet of water in the vessel. "Then of course this commenced to look kind of blue for us "having seven feet of water in the hold of the vessel, **loaded "DEEP with guano,** or comparatively deep; but it is a hard "cargo to carry; it is a sinking cargo."

The District Judge's mistake arose from the confused way in which Cahoon told of the voyages he had made; but his testimony, *read in connection with the log*, becomes clear.

He said (p. 45): "I was on the 'Morrison' *two voyages before* "*and one after*" (pp. 45, *83*). "The *first* cargo we took a *general* "cargo to Charleston; * * * we brought phosphate rock back.

"*Next* time we took *guano* to Savannah and come back, and on "the *third* trip *we took the load we are speaking of now*. I was not "on her any voyage *after that*. *I left her in Elizabethport that time* "*we came back*."

What did the witness mean by a "*voyage*"?

"*One* after" is evidently the voyage from Bull River to Elizabethport.

The log shows the following voyages:

(1) Boston to Charleston, general cargo, November 15th to November 25th (pp. 93 to 95).

At Charleston, November 26th to December 7th (p. 95).

(2) Charleston to Boston, cargo of rock and cotton, December 9th to December 18th (pp. 95 to 97).

At Boston, December 19th to December 29th (p. 97).

At Weymouth, December 29th to January 2d (p. 97).

(3) Weymouth to Savannah, cargo guano, January 2d to January 27th (pp. 97 to 102).

At Savannah, January 28th to February 11th (p. 103).

At Bull River, February 12th to February 23d (p. 103).

(4) Buil River to New York, cargo of rock, February 24th to March 4th (103 to 105).

At Elizabethport, March 5th to March 19th (p. 105).

The only one of these voyages she carried *guano* was the one from Boston to Savannah, and Cahoon expressly says "loaded deep with *guano*" (p. 48, *89*).

On voyage 1 she carried general cargo, amount not stated. Second mate Cahoon says (45): "The first we carried a general "cargo to Charleston, and from Charleston we went to Bull River "and loaded with phosphate rock, and back to Weymouth, bringing "a full cargo *because there was no bar to contend with*, and they "loaded her full—deep."

Note. Cahoon got mixed here. The schooner loaded on November 30, at Charleston, 450 tons of rock (Log, p. 95), and then on December 1, took in 296 bales of cotton; on December 3d, 227 bales of cotton; on December 4th, 130 bales of cotton; on December 5th, 203 bales of cotton; on December 6th, 193 bales of cotton, and on December 7th, 50 bales of cotton—in all 1,099 bales—and then drew 14 feet 4 inches aft, and 14 feet 3 inches forward—and sailed to Boston.

On voyage 2, as above shown, she carried 450 tons of rock and 1,099 bales of cotton, and drew 14 feet 2 inches on an even keel.

On voyage 3 she carried 756 tons of guano for libellant, and drew 16 feet 2 inches on an even keel (Log, Jany. 2, pp. 97, *172*).

On voyage 4 she loaded 745 tons of rock at Bull River, and drew 15 feet 9 inches on an even keel (Log, Feb. 12th, pp. 103, *178*).

This is the voyage on which Cahoon says (p. 45) "she loaded "with phosphate rock, bringing a full cargo, because there was no "bar to contend with, they loaded her full—*deep*."

And see how he exaggerates (p. 45): "Q. How did that cargo "correspond with this cargo of fertilizer you took on this voyage— "was it more or less? A. *More*; 850 to 900 tons." In fact, as the log shows, it was 745 tons, or 11 tons less than the fertilizer—and she drew five inches less water.

The Motive for Overloading.

By the charter (pp. 3, 6) this cargo was to be paid for by the ton, and Captain Lavender owned one sixty-fourth, and received *five per cent. of the gross freight*, besides his wages (pp. 22, 44).

The Movable Cap of the Bilge-Pump Plate.

The Court found (V. Fdg., p. 12) that the "cap projected about "three-eighths of an inch above the surface of the plate, the edges "being beveled off so as to leave not more than an eighth of an "inch of perpendicular surface."

Libellant excepted to this (II. Exception, p. 19) on the ground that the uncontradicted evidence conclusively showed that the cap did not project more than one-eighth of an inch above the surface of the plate, the edge being beveled (see II. Exception, p. 19).

Judge Brown found (p. 115): "Such caps usually project a "little above the surface of the waterway, the upper edge of the cap "being bevelled off so as to leave, usually, *not more than an eighth* "*of an inch* of perpendicular surface." And at page 116: "The "claimant did not introduce any proof *by exact measurements* to "show what was the height of the cap above the waterways or the "height of the perpendicular edge of the cap up to the beveling, "*nor was* the duplicate cap on the starboard side produced."

"Only some models and samples of what is usual were produced."

Atwood, managing owner, and who saw the construction of and attended to repairs to the schooner (pp. 40, 75, and 41), said (p. 41, *76*): "*When the cap was screwed on tight it projected a little above* "*the plate*—**I should think an eighth of an inch,"** and again (p. 43, *80*): "Q. You say that bilge cap which screws into the bilge "plate was about an eighth of an inch higher than the plate itself? "A. That is my judgment, as far as I remember.

"Q. Was it an eighth of an inch *square at the edge* or *flared* "*down?* A. Rounded off—not exactly even, but rounded off a "little."

The models and samples *not offered in evidence*, which Judge BROWN speaks of, are mentioned at page 62, *113, and claimant's* is declared by the witness (p. 62, *113*) to be *unfinished.*

Atwood further said (p. 43, *80*): "That was the general form "(referring to exhibit) of the plate I described, only ours was much "larger than this. I think the cap was rounded off about like that."

"BY THE COURT: Q. The edge was rounded off like the edges of that model?

"A. Yes, sir."

Cahoon, second mate (p. 53, *98*) says: "The cap was round, "and when it was screwed down on to the plate, **probably** to "take and lay a stick or straight-edge across the top of it from the "brass, not the cap, the brass itself, the plate, it would be **prob-** "**ably** three-eighths of an inch higher than the plate. The edge of "the cap came off a little tapering, little beveling, but **probably** "the very edge where it came down to the cap would be two-eighths; "**probably** it beveled an eighth of an inch from the middle down. "*I never made any particular observations. I never measured the cap* "*to find out.*"

Thurlow, the ship chandler who fitted the schooner out (57, *104*) said (p. 61), being handed a sample by claimant's counsel: "I "should suppose she would have a cap a little bigger than this, and "the screw would be bigger. That is about the height of the cap, "but those are generally *more finished than this is.* Q. And the "larger the plate the thicker the cap? A. The thicker the cap. **I** "**was looking at a cap this morning A QUARTER** "**OF AN INCH above the plate, but THAT WAS** "**A VERY LARGE CAP."**

Claimant had the *burden* of establishing how much the cap projected. Two of his own witnesses (and one of them the managing owner) said about one-eighth of an inch, but the Circuit Court found it was three-eighths on a mere *guess* of the second mate.

The Appearance of the Cap.

The XI. Finding (p. 13) is that "the cap and plate *appeared to be* "*in good order*, with no *indication* of looseness;" and libellants excepted (see III. Exception, p. 19) on the ground that such finding is unsupported by evidence, and that no evidence was introduced to prove it.

What is an "*appearance* of good order," and what is "*no indica-*
"*tion* of looseness?"

Obviously these questions can only be answered with reference to the subject matter—*i. e.*, the seaworthiness of a vessel.

As well say that *painted wood appeared sound* with no indication of rottenness, because the eye alone rested on the paint, and could not see into the interior, though the plank would crumble to the touch and a knife would go through it like paper.

Is *such* observation to be accepted as a test of seaworthiness!!

When Was the Bilge Pump Plate Lost?

The XVI. Finding is (p. 15): "It is, however, to be inferred "* * * that it (the bilge pump plate) was knocked out * * * "*subsequently* to the time when they wore ship *after* finding 18 "inches of water in the well, which would be between 5 A. M. and "5:30 A. M."

Libellant excepted (see IX. Exception, p. 20) as without evidence and contrary to the proper inference.

The facts detailed show that the leak was controlled and the pumps sucked *as soon* as the hole was stopped. The inference is that the hole *caused* the leak. As the pumps sucked at 4:30 A. M. (p. 47, *87*) and at the subsequent pumping at 4:50 A. M. (p. 46, *87*), they did not suck again until the hole was found and stopped; the inference that the hole was opened *after* the leak was in existence is absurd.

Libellants' Exception to Evidence.

At page 71–*129* it appears that on the reference to *compute damages* a commission was issued to Savannah, and that the District Court permitted *oral* questions in addition to the written interrogations, on which evidence as to the *supposed cause of the damage* was elicited from the witness Thos. H. Laird.

This evidence was objected and excepted to by libellants on the hearing of the reference (p. 72), and also on the trial of the appeal in the Circuit Court (p. 73, *132*), and the exception overruled. The opinion expressed by Laird on seeing the condition of the schooner in Savannah after the vessel had been exposed for 17 days (*i. e.*, from January 10 to 27th, log, pp. 98 to 102) to all the *straining* due to her greater immersion with the wet cargo of guano, by reason

of wh'ch Capt. Lavendar said she made "heavier weather" (89–159), was clearly incompetent. This *opinion* was not based on any knowledge of any facts of the voyage, for he said (p. 74), "I know "nothing of the actual facts of the voyage"—and his idea that there was *a pipe* to the bilge-pump was wholly erroneous. There was none.

The Exaggerations.

Brown, J., said 117: "The testimony on behalf of the vessel "at the trial, I must deem somewhat exaggerated, both as to the "severity of the gales she met and as to the amount of water on deck "*prior* to the time when the leak became serious. It is noticable "that although the log says the vessel on the 9th was laboring "heavily and shipped great quantities of water, this is not stated to "have been the case on the 10th until after 8 A. M., several hours "after this leak began, although it is said the sea was running "very high."

Note—Lying-to the vessel would nearly head the sea,and naturally would ride more easily.

The Orguendo, 38 L. T., N. S., 154; Sir ROBERT PHILLIMORE: "This state of the weather is no doubt supported by the evidence of "the master and the crew, and is necessarily not contradicted by "any positive evidence on the other side. At the same time I have "thought it my duty to call the attention of the Elder Brethren to "the terms of the protest *and the condition the vessel must have been "known to have been in*, if she had encountered the weather repre- "sented, *and to contrast that with her arrival on the 28th, only four "days afterwords, without any signs of distress, and the small ex- "pense incurred in refitting her.* The Elder Brethren are, in con- "sideration of these matters, decidedly of opinion that the state- "ments, both in the log and the protest, are grossly exaggerated. "* * * I accept the opinion that the terms are *grossly exagger- "ated.*"

Lavender's Exaggerations.

He says (p. 25, *49*): The entries in the "log were always accur- "ate," and that he "knew of the entries in it at the time they were "made."

Yet he details the carrying away of the forecastle door as occurring on January 10, *when* the bilge-pump plate was lost (28, *55*), while the log shows it occurred on January 12 (p. 99), and he says (p. 30) the log is right.

At page 29, *56* he says they had to pump every fifteen minutes and the log (p. 99) shows it was every half hour, and he says (p. 29, *57*) that the entry is right.

He says (p. 30, *58*) that the hole in scuppers was found on January 11, when (p. 30, *58*) a thorough examination was made, but the log shows it was found on January 12th (Log, p. 99).

He says (p. 29, *56*) that the hole in the mast coat was discovered *next* morning, and the log shows (p. 100) that it was found on January 15.

Cahoon's exaggeration of the cargo of rock from Bull River *increased* from 745 (Log, p. 103) to between 850 and 900 tons (p. 45 *83*) to show she was not overloaded, has already been pointed out.

The Damages.

The burden lay upon the claimants to show not only a sea peril, but the *extent* of that sea peril, as their excuse for the damage to the cargo, and whatever they fail to prove to have been caused by a sea peril must be attributed to the defect in the vessel.

The injury to the libellant's cargo was caused by a wrong on the part of the claimants in not providing a safe and secure vessel, and the rule in such cases is that the wrongdoer must bear the burden of showing how much has been caused by any excepted peril.

The "**Egyptian**" (10 L. T., N. S. 910). This was a case of collision, and Dr. Lushington said :

"I apprehend the principle to be that if a part of the damage be "clearly attributable to the wrongdoer, and if it be impossible to "draw the line with precision, and say how much, the wrongdoer "must bear the loss. * * * I adhere firmly to the principle "that the plaintiff in all cases of doubt ought to have the benefit of "that doubt against the wrongdoer."

The "**Shand**" (16 Fed. Rep., 570) was a case of injury to cargo by sea perils, and a further injury *by negligence* in omitting to keep the pumps going after arrival of the vessel at her port (see 10 Ben., 295), and Judge Brown followed the same doctrine ; he says (575) :

"The burden of proof in this case, as held on the trial, is upon "the claimant as carrier of the goods, and, as such, he must bear

" whatever loss is not shown with *reasonable certainty* to have arisen " from the first flooding of the sugar, or the prior waste from perils " of the sea."

The same principle is enunciated in the **" Mayflower "** (Brown's Ad., 389) in these words of Dr. Lushington, quoted from the **" Gazelle "** (2 Wm. Rob., 284):

" If the settlement of the indemnification be attended with any " difficulty (and in those cases difficulties must and will frequently " occur), the party in fault must bear the inconvenience. He has " no right to fix this inconvenience upon the injured party; and if " that party derives incidentally a greater benefit than mere indem- " nification, it arises only from the impossibility of otherwise effect- " ing such indemnification without exposing him to some loss or " burden, which the law will not place upon him."

Judge HOFFMAN, in the case of the **" Mary Belle Roberts "** (2 Sawyer, 16), says:

" The cargo being found to be damaged, the burden of proof was " on him " (the carrier) " to show that his loss was occasioned by " one of the causes which, by law and the terms of the contract, " afford an excuse for its non-performance. * * * To excuse " himself for that portion of the loss for which he is not liable he " must show how much that portion is; and, unable to exonerate " himself *in toto*, he should establish the degree and extent of the " exoneration to which he is entitled."

Interest in Admiralty.

The **America**, 11 Blatch., 486:

" Where the value of the thing lost or the cost of repairs and " the like are the test or measure of recovery, and the amount of " damages becomes *mere matter of computation*, **interest is as " necessary to indemnity** *as the allowance* of the principal " sums."

The Baltimore, 8 Wall., 385:

" *Restitutio in integrum* is the leading maxim in such cases;" * * * (p. 386) " allowance for freight is made in such a case, " * * * *together with interest* on the same.

The Blenheim, 18 F. R., 47:

(Circuit Court, Mass.) Judge LOWELL allowed interest on an admiralty appeal on the amount of the District Court decree, *thus*

giving interest on interest, and said: "Lord STOWELL twice decided "that it is a *just* rule to allow interest upon interest in cases sub- "stantially like this."

The Umbria (Dec. 13, 1892):

The Circuit Court of Appeals for the Second Circuit followed Judge LOWELL, expressly approving the "Blenheim."

The Wanata, 95 U. S., 613:

CLIFFORD, J., said: "Interest in such cases is allowed as well "as costs, and in case of appeal *the interest is cast upon the whole* "*amount*, including the costs as well as the amount of damages."

The Northumbria, L. R., 3 Ad. & Ec., 9.:

SIR ROBERT PHILLIMORE: "It is not denied that the practice of "this Court has been **invariable as to allowing interest,** "but it is contended that this practice is erroneous, at variance "with the *common law*. * * * If it were necessary to examine "this proposition I should find it difficult to reconcile it with the "recent case of British Columbia Sawmill Co. vs. Nettleship, L. R., "3 C. P., 499.

"But it appears to me quite a sufficient answer to "these authorities to say that the ADMIRALTY, in "the exercise of an equitable jurisdiction, has pro- "ceeded upon another and a different principle from "that on which the common law authorities appears "to be founded.

"The principle adopted by the Admiralty has been "that of the CIVIL LAW. That interest was always "due to the obligee when payment was not made *ex* "*mora* **of the obligor, and that whether the obligation "arose** *ex contractu* **or** *ex delicto*. * * * **It is quite clear "that JUSTICE required** that a debt which was due, but "payment of which was delayed, *should carry interest*."

The Gertrude, 12 P. D., 266 (1887): "There can be no doubt "that **it has been a long-established principle of the "ADMIRALTY Court to allow interest** on the amount "awarded to the plaintiff from the time when the claims arose. * * * "It is *clearly established* that in **Admiralty** actions there should, "as far as possible, be a complete *restitutio in integrum*, and for this

" purpose **the award of interest on the damages is nec-**
" essary."

The Gertrude, L. R., 13 P. D., 109. The Court of Appeals in affirming this case said: " It has been further urged that, assuming " these were admiralty cases, the practice in the Admiralty Division " of awarding interest *eo nomine* on the amount of the assessed dam- " ages is wrong and should be overruled, and the practice assimilated " to that in the Queen's Bench Division. But to this latter argu- " ment I cannot accede, *because it does not seem to me that there is* " *anything unjust in the mode in which the Admiralty Court has* " **always** *assessed the damages.* On the contrary, I am inclined to " think it *more just* than the common-law rule.

The Mistake of the Circuit Judge.

The proctor for the " Morrison," on the appeal to the Circuit Court, cited much insurance law, a part of which was as follows:

(1) " If the vessel had been lost, and no one survived it, * * * " the *presumption* would be * * * that it was caused by a peril of the sea.

" Gordon vs. Browne, 2 John., 15.
" Brown vs. Neilson, 1 Caines., 525.
" Lowndes on Mar. Ins., 108.
" Parson on Mar. Ins., Vol. 1, p. 547, *et passim.*" * * *

" The situation is similar to that which would have arisen if the " insurance company *(which, having paid the loss, became subrogated* " *to the rights of the owners of cargo, and is the real party in interest)* " had refused to pay and been sued. The *defense* would have been " unseaworthiness, and *the burden of proving it have been upon the* " *defendant,*" quoting from CURTIS, J., in Bullard vs. The Roger Williams Ins. Co., 1 Curt., 150, and from Union Ins. Co. vs. Smith, 124 U. S., 412; Phil. on Ins., Vol. 1, p. 644; McArthur on Mar. Ins., 110, 111; Lowndes on Mar. Ins., 108, 109, 185, 186; Arnould on Mar. Ins., 5th Ed., Vol. 2, p. 731; *Id.*, 708; *Id.*, 643; Lunt vs. Ins. Co., 6 F. R., 561, 568; Moore vs. Louisville Underwriters, 14 F. R., 226.

This law was accepted by the Circuit Judge, who overlooked or disregarded the very material and obvious distinction so often laid down.

(1). That under the *contract of insurance* the underwriter contracts to pay for a loss *by a specific cause*, a *proximate* and not a remote cause, and is therefore not permitted to show that *negligence* was the cause of the cause, because the shipowner has not contracted with the insurer that his crew will not be negligent.

See Liverpool, &c., Steam Co. vs. Ins. Co., 129 U. S., 438, extracted from at page 27 of this brief.

And (2) that the *implied warranty of seaworthiness*, which is a *condition precedent* to the contract of insurance existing or coming into being at all, requires the ship owner to *allege and prove* that the vessel was seaworthy *when* the insurance contract was made (and it is *conditionally* made in all cases upon the agreement that it is not to exist if the vessel is not *then* seaworthy) and that *when*, by *such proof, seaworthiness is shown* the insurer is liable for a loss by a *sea peril* (although caused by negligence), unless he can overcome such proof of seaworthiness or show the breach of a new and distinct implied contract, *i. e.*, to keep the insured vessel seaworthy, *and that the loss was caused by such breach.*

Union Ins. Co. vs. Smith, 124 U. S., 427 :

" The principle adopted by the Circuit Court in laying the case " before the jury was the proper one. In the insurance of a vessel " by a time policy the warranty of seaworthiness is complied with " *if the vessel be seaworthy at the commencement of the risk*, and the " fact that she subsequently sustains damage and is not properly " refitted at an intermediate port does not discharge the insurers " from subsequent risk of loss, *provided such loss be not the consequence of the omission.*"

The burden of proving unseaworthiness is not upon the underwriter when sued.

There is a grave distinction between the English and American law of insurance upon this head.

The American Doctrine.

1 Phillips on Insurance (fifth edition) :

§ **695.** " In a marine insurance, whether it be on the ship, " freight or cargo, or the commissions or profits to accrue upon the " cargo, the assured is understood impliedly to warrant by the mere

" fact of effecting the insurance, independently of the particular " terms used, that the ship *is, at the commencement of the voyage,* " *seaworthy*—namely, **that the material** *of which the ship is* " *made*—**its construction,** *the qualifications of the captain, the* " *number and description of the crew, the tackle, sails and rigging,* " *stores, equipment and outfit generally are such as to render it in* " *every respect fit for the proposed voyage or service.*"

§ **724. "The seaworthiness of a vessel at the outset " BEING A CONDITION PRECEDENT MUST BE " PROVED BY THE ASSURED IN THE FIRST " INSTANCE."**

§ **729. " Whether the policy is for a voyage or a " period of time, the construction of this warranty is " the same as to compliance being a condition prece- " dent at the outset."**

§ 730. " After the policy *has once attached* a compliance with the " warranty ceases to be a condition precedent to the liability of the " insurers for any loss."

1 Parsons Maritime Law, 133 :

" This warranty *(i. e.*, implied warranty of seaworthiness*)* is " strictly *a condition precedent* to the obligation of insurance, and if " it is not performed *the policy does not attach*, and if this condition " be broken at the inception of the risk in any way whatever, and " from any cause whatever, there is no contract of insurance, the " policy being wholly *void.*" *(Note.* Thus show that it is not a *de- fense*, for the contract must exist before the Insurance Co. can *defend* against a liability *under it.)*

In **Hazard vs. N. E. Mar. Ins. Co.** (8 Pet., 581), McLean, J., says :

" In *every* policy there is an implied warranty of seaworthiness, " and this is *a condition precedent* on the part of the insured. The " policy does not attach, unless the vessel be properly *manned* and " provided with all reasonable stores, and in all respects fit for the " intended voyage " (s. c. below, 1 Sum., 218).*

---

* Seaworthiness, as above shown, consists not only in a sound and staunch HULL, but embraces the *outfits, stores and crew*, and also *loading*. And these are constantly either being consumed or changing. The silliness of a continuing *presumption of seaworthiness* is here made self evident.

Moses vs. Sun Mut. Ins. Co. (1 Duer, 159) DUER, J. (175) : " We were told, indeed, by the learned counsel for the plaintiff " that *the seaworthiness of the ship when the risks commences, is a pre-* " *sumption of law* which can only be repelled by positive evidence " on the part of the underwriter: he must prove, even where it " appears that the vessel became unseaworthy in the course of the " voyage, that she was unseaworthy when it commenced ; nor can " it be said that this position is destitute of authority. It is in a " measure sustained by the opinion of Mr. Phillips, and by two or " more decisions of the Supreme Court of Massachusetts " (1 " Phillips, 324, 2 do, 757 ; Taylor vs. Lowell, 3 Mass., 341 ; Paddock " vs. Franklin Ins. Co., 11 Pick., 227).

" In the case, however, of Tidmarsh vs. Washington F. & M. " Ins. Co. (4 Mason, 441), **it was decisively rejected by that " consummate master of commercial law, Mr. Justice " Story ; and for reasons that appear to us not merely " satisfactopy, but conclusive.** The seaworthiness of the " vessel when the risks commence is *a condition precedent* to the " attaching of the policy, and the fulfillment of this condition is the " implied warranty of the assured. *The general rule cannot be* " *denied that the burden of proving the fulfillment of a condition* " *precedent, rests upon the party whose right to maintain his action* " *or defense, depends upon its performance, and no reason has been* " *given why this rule is not just as applicable to the implied warranty* " *of seaworthiness as to an express warranty of neutrality.* The " alleged exception would be purely anomalous."

" The true rule deducible from a full comparison of the cases " appears to be that which is stated by Mr. Arnould. *The assured* " *is bound to aver and prove that the ship was seaworthy when the* " *risks commenced*, but the proof to be given by him in the first " instance need not be particular and full. Although slight and " general, if not contradicted, it is deemed sufficient, and, when " given, it shifts the burden upon the underwriter."

Tidmarsh vs. Washington F. & M. Ins. Co. (4 Mason, 441), **Story, J. :** " *In respect, however, to the point of seaworthiness,* " *a very different principle prevails. There the* **burthen of proof** **" rests upon the plaintiff himself,** *for the existence of sea-* " *worthiness at the commencement of the voyage is a condition prece-* " *dent implied by the law to the attaching of the policy.* Unless, " therefore, the vessel be seaworthy at the commencement of the

" voyage, *the underwriter is never bound, for the contract has never* " *attached itself to the risk.*"

Craig vs. U. S. Ins. Co. (Peters' Cir. Ct. Reports, 410), WASHINGTON, J. (416): " But it is unquestionable *that every war-* " *ranty in a policy, whether they be expressed or implied, constitutes a* " *condition precedent.* Not precedent, in point of time, to the incep- " tion of the voyage, but to the plaintiff's right of recovery. That " is, he cannot, in any instance where he has entered into a warranty, " recover against the underwriters without first *averring* and **prov-** " **ing** performance of those stipulations."

Van Wickle vs. Mechanics, &c., Ins. Co. (97 N. Y., 353), MILLER, J.: " In every case of marine insurance there is an " implied warranty of seaworthiness on the part of the insured, and " if the vessel is not seaworthy the policy does not attach. *This* " *warranty of seaworthiness is a condition precedent, the performance* " *of which must, to entitle the plaintiff to recover, be alleged and* " **proved** *by him.*"

In **1 Marshall on Insurance** (153) the same law is laid down, and it is also said (156): " As the insurer is only liable for " losses arising from the extraordinary and unforeseen perils of the " voyage, if the ship becomes unnavigable, or incapable of proceed- " ing on the voyage insured, *all the writers agree that the presump-* " *tion shall be that this proceeded from the age and rottenness or other* " *defect of the ship*, unless it **be made to appear** to have been " occasioned by sea damage or some unforseen accident."

Citing Targa page 256; Pothier, h. t. n., 66; Cesaregis Dis., 142; n. 15; Valin, art. 28, 29 and 46 h. t., page 76.

At page 98 **Valin** says: **" La présomption est, que le " mauvais état du navire vient de son propre vice."**

Emerigon (Meredith's translation, 299) says:

" The captain is bound to have his vessel well fitted, properly " caulked and well conditioned."

And on the same page, " It has just been seen that insurers do " not answer for losses which have happened by the fault of the " master."

Berwind vs. Greenwich Ins. Co., 114 N. Y., 233, (1889) (2d Div.), BROWN, J.: " The action was on a time policy * * * " for the term of one year * * * upon the canal boat 'Eureka.'

" In *every* case of marine insurance by a general policy covering " *all* perils of the sea, where the vessel insured is in port, *there is an*

" *implied warranty* that the vessel is seaworthy at the inception of " the policy.

" It is a condition precedent to the *inception* of the risk " *(i. e.,* contract*)*, " and if the vessel is not seaworthy, *the policy does not* " *attach.*

" In an action to recover for a loss under such a policy, where " the *fact of seaworthiness* at the time of issuing the policy *is shown*, " it is immaterial what the vessel's condition is thereafter *during* " *the voyage*, as loss from unseaworthiness is among the perils in- " sured against. *The plaintiff under such a policy makes out a* " *prima facie* case, **by showing seaworthiness** *at the inception* " *of the risk* * * * (p. 235). It is doubtless true that, under a " general *time* policy insuring against *all* perils of the sea, *unsea-* " *worthiness* **subsequent** *to the attaching of the policy is a defense,* " *the burden of proving which is upon the defendant.*

Under the English law the warranty of seaworthiness is implied in VOYAGE policies only.

1 Arnould Mar. Ins. (6 Eng. Ed., p. 8):

" They are satisfied if the ship be seaworthy at the time when " the policy attaches; that is to say, when she begins to lie in port " or breaks ground to set forth on her voyage. It is a remarkable " extension of this philosophical *indulgence* accorded to human " infirmity, that by the English law *this condition is held inapplica-* " *ble to time policies.*"

Arnould on Marine Insurance (646, 649, 660 and 664):

The author extracts (p. 664) from the opinion of Lord PENZANCE in the case of *Dudgeon vs. Pembroke* (2 App. Cas. 284), who quoted what Lord CAMPBELL said in Fawcus vs. Sarsfield (6 E. & B., 192):

" Whatever may be argued as to the soundness of the conclusion " then arrived at, or however desirable it may be **as a matter of** " **public policy** and concern that some obligation of keeping his " vessel as far as it is within his power seaworthy, should be cast on " the ship owner, the law must, I submit to your Lordships, be con- " sidered as settled by these decisions, *and any change made in it* " *must be by legislative authority alone.*"

The most recent English text books (*vide* McArthur on Contracts of Marine Insurance, 24; and Lowndes on Marine Insurance, 95) treat of the implied warranty of seaworthiness on the same principles, **limiting it, as the English descisions require, to a voyage policy.**

Lowndes says (p. 95): "We come now to 'implied warranties' "or **conditions** of the contract not set down in writing, but "tacitly understood as essential, being grounded in the *nature* of the "transaction between the parties. A breach of one of these tacit "conditions is no less *fatal to the* **contract,** and is fatal to it pre- "cisely in the same way, as the breach of an express warranty." * * * Sec. 104. "It is, for example, an implied warranty in "every insurance *for a voyage*, that the ship shall at the outset of "it, and more particularly when she puts to sea, be seaworthy, or "reasonably felt in every respect to encounter the ordinary diffi- "culties of that voyage."

Preliminary Observation.

Application of the English law.

BRAMWELL, L. J. (Bradlaugh vs. Queen, L. R. 3, Q. B. D., 620, C. of Ap., 1878): "*Decisions in the Courts of the United States are not* "*binding authorities, and, although they may be expressly in point, yet* "*if they are contrary to our law they must be disregarded.* What- "ever respect we may be disposed to pay to the Judges who pro- "nounced the decision, the only manner in which an American case "can be used as a guide is to consider it as the expression of the "opinion of an able person acquainted with the general spirit of our "law."

COTTON, L. J., 640: "We are in no way bound by the American "decisions; their effect is simply that they may enable us to see "how principles recognized by the law of England ought to be ap- "plied, by showing us how learned Judges in other countries have "acted on those principles; but if, in fact, the judgments of the "American Courts are founded upon principles which we do not "recognize, then, of course, those decisions are perfectly useless, "and can be neither guides nor authorities."

Whatever views may have been entertained upon the question of *the presumption of seaworthiness in actions on policies of marine*

insurance by the English Courts, they are valuable only (1) as arguments, and (2) as arguments only in *insurance cases*, if it is shown that (1) the American law of insurance is different or (2) that insurance cases are judged by a different law.

Presumption of Seaworthiness in the English Law of Insurance.

Dugeon vs. Pembroke. 2 Ap. Cases, 293 (H. of Lds., 1877):

Lord PENZANCE: "The policy then being a *time* policy, the first "question raised for your Lordship's determination is whether the "law *implies* in such a contract *any warranty* that the vessel *should* "*be seaworthy at any period of the risk*, and, if so, at what period "or periods? My Lords, this is no new question, it was raised in "the case of Gibson vs. Small, 4 H. L. C., 353, which was deter- "mined by your Lordship's House in the year 1854, and has been "the subject of more than one subsequent decision. I do not pro- "pose to trouble your Lordships by reviewing the arguments on "this question because I consider that the case of Gibson vs. Small, "supplemented as it was by the two cases of Thompson vs. Hopper, "6 El. & Bl., 172, and Fawcus vs. Sarsfield, 6 El. & Bl., 192, must "be considered to have set at rest the controversy on this subject "and to have finally decided that *the law does not in the absence of* "*special stipulations in the contract infer in the case of a time policy* "*any warranty that the vessel at any particular time shall have* "*been seaworthy.* In pronouncing the judgment of a majority of the "Court in the latter case Lord CAMPBELL said: 'For the reasons "'which I gave in the case of Gibson vs. Small, and which I have "'given in the case of Thompson vs. Hopper, *I think there is no* "'*implied warranty of seaworthiness in any time policy.*'

"From that time, upwards of twenty years ago, to the present "time these decisions have been acted upon and submitted to; "* * * and, whatever may be argued as to the soundness of "the conclusions then arrived at, or *however desirable it may be as* "*a matter of public policy and concern that some such obligation of* "*keeping his vessel, as far as it is within his power, seaworthy,* "*should be cast on a shipowner*, the law must, I submit to your "Lordships, be considered as settled by these decisions, and any "change in it must be by legislative authority alone."

And it was so held by the unanimous judgment of all the Judges.

Quebec M. Ins. Co. vs. Comm. Bk. of Canada, L. R. 3 Privy Council, 234 (1870). The policy was on a *voyage* "at and from Montreal to Halifax" (235).

Lord PENZANCE says (p. 240): "The general proposition is not "denied that, in *voyage* policies, there is an implication by law of a "warranty of seaworthiness" * * * (243); "the warranty, if "broken, *exempts* the underwriter from loss by fire or pirates or any "other damages, **though in no way referable to the "UNSEAWORTHINESS itself."**

This demonstrates that the warranty is *a condition precedent*, which view is fortified by the case of Forshaw vs. Chabert, 2 B. & Ald., 320, cited by Lord PENZANCE (244), "in which a defect existed "at the time the vessel sailed, was completely remedied at Ja- "maica, the port into which the vessel put for that purpose, and, "after the defect was completely remedied, the vessel was lost on "the voyage from Jamaica to Liverpool, and yet the underwriters "were held not responsible."

It is obvious, on principle, that if the policy does not *attach unless* the vessel be seaworthy, that the insured, claiming that it did attach, must *allege and prove seaworthiness*. Yet here is just the place where the English law fails to apply principles.

Pickup vs. The Thames & M. Ins. Co., L. R., 3 Q. B. D., 594:

The action was "on a policy on freight on a cargo of rice, shipped on board the ship Diadem, on a **voyage** from Rangoon to a port in the United Kingdom.

Amongst other *defenses* was one of unseaworthiness (p. 595). The jury, having returned into Court, asked to be instructed "which of "the parties had the onus of proof cast upon him" (597). The trial Judge directed the jury, "as matter of law that while the *presump-* "*tion of law* was prima facie in favor of seaworthiness, and the bur-* "*den of proving unseaworthiness was in consequence, in the first* "*instance, on the insurers*, yet, that if the inability of a ship to pro- "ceed on the voyage became evident in a short time after sailing, "the *presumption of law*† is that the inability arose from causes ex- "isting before she set sail."

---

* A clear blunder. Presumptions of *law* are irrebutable.

† The Court should have said the "logical and necessary inference."

In the Court of Appeals, BRETT, J., said (p. 600): "The burden "of proof *upon a plea of unseaworthiness* to an action on a policy of "marine insurance lies upon the defendant, and so far as the *plead-* "*ings* go it never shifts; it always remains upon him" * * * (p. 601). "It seems to me * * * that when the jury were prac- "tically told that, as a matter of law, they were to take it that she "was worm-eaten at Rangoon, *unless the shipowner could show* "*that she was not* (602), * * * it was such a wrong direction "that it would almost inevitably lead to an erroneous consideration "of the issue."

COTTON, L. J. (602) concurred that there was a misdirection, saying: "The direction, I think, induced the jury to believe *that* "*the defendants were relieved from proving* **their plea** *of unsea-* "*worthiness, and that it was for the plaintiff to show seaworthiness at* "*the commencement of the risk.*"

THESIGER, L. J. (603) stated what the trial Judge should have charged: "All that he could say was this: 'The burden of proof "'remains as it originally remained, namely, *that if there had been* "'*no evidence on the one side or on the other, the plaintiff would have* "'*been entitled to a verdict on the question as to whether the ship was* "'*or was not seaworthy at the commencement of the voyage.*"

At page 604 the same Judge considers the issue *of a loss by the perils insured against*, and says: "It is perfectly true that upon *that* "issue the *burden of proof lies on the plaintiff*: * * * but, on "the other hand, **there is no presumption AGAINST sea-** "**worthiness.**"

Note. It is just here that the English Judge loses sight of the *condition precedent* to the policy attaching, *which lay upon the plaint-* *iff to prove from first to last, viz., seaworthiness*, which proof he supplies according to the English view by "the *original presump-* "*tion of seaworthiness*" (p. 605), although he nowhere informs us where that presumption comes from and why it is not as much *neuter* as the converse—"no presumption *against* seaworthiness" (*i. e.*, no presumption in favor of unseaworthiness).

But a presumption, at best, merely takes the place of proof, and the "burden of proof" remains the same; if the presumption is met by evidence which repels it, the party having the burden must supply new evidence or fail.

Presumption of Seaworthiness in the Massachusetts Cases.

Porter vs. Bussey, 1 Mass., 436 (1805): An action for return of premium. **Heard upon an agreed state of facts**—showing a fault in the vessel's construction *(i. e. a hole through her keel)* which rendered her unseaworthy—and the "Judges who were "in favor of the plaintiff rested their opinion upon the general "doctrine, viz., that in every contract of insurance there is an im-"plied warranty that the ship is seaworthy—and if it appear that "she was not so, the contract is *void*. Recovery had by plaintiff for "the premium."

Taylor vs. Lowell, 3 Mass. (1807): *Heard upon an* **agreed** *state of facts.* Action for *premium* of marine insurance on ship "Three Sisters," under a *voyage* policy dated January 13, 1798, "**at** "and from Calcutta to her port of discharge in the United States." The ship arrived in Calcutta March 3, 1797, and sailed August 9th, 1797, in a leaky condition; returned to Calcutta; repaired, reloaded and sailed again February, 1798 (p. 334). Defendant contended that the policy *never attached* on account of the unseaworthy condition of the ship (p. 342). SEWALL, J. (p. 342), after showing that the contract is entire and (p. 344) that unseaworthiness prevents the policy attaching and makes it *void*, and no risk is run by the insurers, then points out (p. 345) that the risk was "at and from," and this, therefore (p. 347), allowed a separation of the risk into two parts, and concludes that (p. 348) *repairs in port* are in the contemplation of the parties, and that the warranty is broken by sailing in an unnavigable state—and (p. 352) that the insurers took the risk *while in port*, and, therefore, were entitled to the premium.

Paddock vs. Franklin Ins. Co., 11 Pick. (28 Mass.), 226 (1831): Voyage policy on ship "Tarquin," during a whaling voyage. At the trial MORTON, J., charged the jury (p. 227) "that there was an "implied warranty in every policy of insurance on vessel or property "that the vessel was seaworthy for the voyage insured, *and that* "*every vessel was presumed to be seaworthy and competent to perform* "*the voyage described in the policy.* That if the vessel founders at "sea and the proof ends there, the assured will be entitled to re-"cover, *because she will be presumed to be seaworthy.*" The Supreme Court dealt with the alleged *presumption* in the Judge's charge as follows (SHAW, C. J., p. 230): "If she was not at that

" time [*i. e.*, the commencement of the voyage] staunch and strong " and in all respects manned, fitted and well equipped for the con- " templated whaling voyage, the implied warranty of seaworthiness " was not complied with, *and, that being a condition precedent, the* " *policy did not attach.* Upon this point some question was made " at the trial, *but the weight of evidence preponderated in favor of the* " *assured.*" * * * P. 237 : " The plaintiff insists that *the pre-* " *sumption of law* is that the ship is seaworthy and the insurer must " prove a want of seaworthiness in the vessel insured if he would " thereby avoid the contract, and relies on a *remark* to that effect in " Taylor vs. Lowell, 3 Mass., 347."

Note. The *remark* of Judge SEWALL was as follows : " In practice, therefore, " when a loss is demanded upon a policy of insurance, the assured is held to prove " his interest. In the other case, *the insurer must prove a want of seaworthiness in* " *the vessel insured if he would thereby avoid the contract.*"

This *remark* was wholly *obiter*. The case was before the Court on an *agreed state of facts*" (see p. 332).

" There is no doubt we think, as it was above stated by Mr. " Justice SEWALL in delivering the opinion in Taylor vs. Lowell, that " where unseaworthiness of the ship at the inception of the risk *is* " *relied on as non-compliance with an implied warranty, either to* " *avoid a loss or to establish a claim for a return of premium, the bur-* " *den of proof is upon the insurer, the presumption of law being that* " *the ship was seaworthy.*

NOTE.—The Chief-Justice got a little mixed *here*. The *insurer* never sues to get " a *return* of premium." The *assured* may do that on the allegation that the policy was void *(i. e.*, never attached because the vessel was unseaworthy*)*. The insurer *(i. e.*, insurance company*)* may sue for its premium and the assured may defend on the same ground of initial unseaworthiness.

Where the Chief-Justice speaks of " *avoiding* a loss," he hardly puts the case of avoiding the " policy " with his usual clearness.

Martin vs. The Fishing Ins. Co., 20 Pick. (37 Mass.), 389 (1838), merely decides that " *if* a vessel is *seaworthy when the* " *policy attaches,* it will be presumed that she continued so *during* " *the time of the risk* in the absence of evidence rebutting such pre- " sumption."

" Policy dated July 23, 1835."

P. 341 : " It appeared that some time in June, 1835, the vessel " was in Boston and was *then* equipped with chain cables of sufficient

" length, and arrived in New York, whence she sailed on December " 13, 1835, bound for Boston, and that on the 15th of December she " was wrecked on Block Island, and came into Newport on the 24th, " and that soon after her arrival there she had but 49 fathoms of " chain cable, which was confessedly insufficient to render her sea- " worthy; it did not appear when the deficiency occurred *although* " *there was evidence to show that there was a sufficient quantity when* " *the vessel sailed from New York.*"

PUTNAM, J. (p. 396), after stating above facts: " The legal pre- " sumption was properly stated to the jury on this point, that *if they* " *found the vessel was seaworthy* **when** *the policy attached, and the* " *risk commenced*, she so continued."

Deshon vs. Merch. Ins. Co., 11 Metc. (52 Mass)., 20 (1846), HUBBARD, J.: " The case of Watson vs. Clark, 1 Dow., 344, " was cited to show that the *onus probandi* is on the *plaintiff* on " the ground of seaworthiness (see also Barnewell vs. Church, 1 " Caines, 234.) But a **usage** has existed in this Commonwealth for " a long course of years—that although the seaworthiness is a matter " of warranty on the part of the assured, and must necessarily be " complied with, *yet he is not called upon* **in limine** to give evidence " of his having complied with it. *It is assumed* as a fact, and he has " the benefit of the presumptions."

Note.—The Judge fails to give any account of the " *usage.*"

The "Presumption of Seaworthiness" in Insurance Cases in the Inferior U. S. Courts.

Bullard vs. The Roger Williams Ins. Co., 1 Curtis 148, (1852):

Action on marine voyage policy. The vessel had put into Key West by reason of sea damage; and estimates of repairs—sufficient it was claimed to constitute a technical total loss—having been obtained by the captain, he abandoned and sued the company.

Judge CURTIS *charged the jury* (149): " Even if you are satisfied " that this vessel was seaworthy at the beginning of her voyage, " there is no presumption that the necessity for the repairs was " occasioned by a peril insured against. * * * In this case " there is no pretense of any negligence by the master during the " voyage, though there is a serious question for your consideration

" whether the vessel was seaworthy at the outset of the voyage. " The law in reference to this will be *presently* stated. * * * I " think you have a right to presume at the outset that the vessel " was seaworthy at the beginning of the voyage, because, as will be " *presently* stated to you, the law so presumes until the contrary " appears." * * * Page 155: " But as I have *already* **indicated** " *the presumption is that the brig was seaworthy*, and the burden " of proof is on the underwriters, by some sufficient evidence, to re- " move this presumption." No other **indication** was given.

Judge CURTIS further said at p. 155:

" There is an implied warranty connected with marine policies " that the vessel, at the outset of her voyage, is seaworthy for the " voyage in which she is insured. *This obligation is imposed by law* " *on the insured for sound reasons.* **It takes away all tempta- " tion to expose life and property to the dangers of " the seas in vessels not fitted to encounter or avoid " them.** It is not a contract that the owner will use diligence to " make his vessel seaworthy, *but an absolute warranty that she is sea- " worthy;* and if broken the policy is made void."

Lunt vs. Boston M. Ins. Co., 6 F. R., 566 (1881):

WALLACE, J.: " It is also contended that the Court erred in in- " structing the jury that the *burden of proof was upon the defend- " ant to establish the unseaworthiness of the vessel.* If this in- " struction had been limited to that branch of the *defense* which was " predicated upon a breach of the *implied* warranty of seaworthiness, " I should be disposed to adhere to it now as correct."

Note. Judge WALLACE *here* made a grave error. The non-compliance with the implied warranty of seaworthiness being shown (or seaworthiness not proved) was not a *defense* at all. It was a failure by plaintiff to establish a *prima facie* cause of action.

" It is everywhere conceded that in every policy of insurance " on a vessel *there is an implied warranty that the vessel is seaworthy*, " but many of the authorities declare that this warranty is a *condi- " tion precedent* to the obligation of insurance; and, as the general " rule is undoubted—that *the performance* of *a condition precedent* " *must be pleaded and proved* whenever it enters into the cause—*the* " *application of that rule to actions for marine insurance seems* " *consistent.*

Note. Judge WALLACE here shows that the plaintiff must **allege** that the implied warranty was fulfilled by him.

"On the other hand, it would *seem to be the reasonable presump-*
"*tion of fact* that a ship is seaworthy *in the absence of any circum-*
"*stances showing the contrary;* and, as it is quite unnecessary to
"make *proof* of facts which will be *assumed* to exist, it has been
"held in many cases that the *onus of proving* **un***seaworthiness* is on
"the party that *alleges it.*"

Note. *Queer logic! The plaintiff must allege seaworthiness* The so-called '*presumption*' supplies the *prima facie* **proof** of seaworthiness which the plaintiff would otherwise have to furnish and sustain (*i. e.* have the *onus* of) against all rebutting proof, but the Judge, confounding the *allegation* with the proof, says that the presumption taking the place of proof, *therefore*, the burden is changed.

Page 567: "The *burden* was on one side or the other to over-
"come a presumption. * * * If the *onus is shifted*
"from the plaintiff to the defendant when the former,
"has given slight and general proof of seaworthiness, it would seem
"to be *shifted back again* when the latter has given proof which is
"more cogent."

Note. Again, the learned Judge has erred in his law. The *onus* never shifts. The *burden of proving* an issue always remains with the party alleging. He may satisfy this burden by *prima facie* proof, which, if uncontested, becomes conclusive proof; but, if contested and *overcome* by contrary proof, there being no *balance* of proof to the credit of the party alleging, he is bankrupt on that issue.

Heilman vs. Lazarus, 90 N. Y., 673:

"The issue, as to which the burden of proof was on
"the plaintiff, was that of title, of right of possession of
"the land *and that burden remained with him to the end*
"* * * in such cases" (*i. e.*, of a conflict of evidence) "it
"is sometimes, and perhaps, *inaccurately said that the burden of proof*
"*is shifted.* In Heineman vs. Heard, 62 N. Y., 455, it was observed
"that by such expressions is only meant that there is a necessity of
"evidence to answer the *prima facie* case, or it will prevail, and the
"same thing is said in Lamb vs. C. & A. R. R. Co., 46 N. Y., 279."

Phillips on Evidence (p. 810):

"The point in issue is to be proved by the party who *asserts* the "affirmative."

Id. (Note 220): "In the examination of the contested fact the "*onus probandi* may in the course of the trial be thrown from one "party to the other several times, according as the *complexion of the* "*proof* may change. But when it is said that the *onus probandi* "is on the party who offers a paper as genuine, *the plain common* "*sense and legal meaning* is that it has reference **to all the evi-** "**dence in the cause** and not merely that which is necessary to "authorize it to be read in the first instance—**in other words, it** "**means that the party affirming the paper to be gen-** "**uine must frunish so much evidence as to LEAVE A** "**BALANCE OF PROOF in favor of the genuineness** "**of the instrument** after making all the allowance for the proof "adduced on the other side to produce a contrary conviction."

Taylor's Evidence (Vol. I., § 365):

"The best tests that can be devised for ascertaining on whom "the *burden of proof lies*, are, first, to consider which party would "succeed *if no evidence were given on either side*, and, secondly, to "examine what would be the effect of striking out of the record the "allegations to be proved, bearing in mind that the *onus* must lie "on whichever party would fail if either of these steps were "pursued."

As the allegation of *seaworthiness before the policy issued* was necessary to plaintiffs' case, inasmuch as it *is a condition precedent* —and as striking it out would render his libel or complaint defective —it is obvious that the *burden* of *proving* it is on him.

Minturn vs. Alexandre (5 F. R., 120), CHOATE, J.:

"The distinction between the sufficiency of the proof of facts *as* "*evidence*, and the sufficiency of the *averment* of facts as matter of "pleading, may be thus stated. Facts (as evidence) are sufficient "when they produce an appearance of probability of the existence "of a right or title (which by the established rules of evidence) con- "stitute *prima facie* proof. But the *rules of pleading* require not "the averment of the appearance or probability merely of a right or "title, but the *averment with reasonable certainty of the actual exist-* "*ence of a right or title*."

Judge WALLACE continues, page 567: "It is a *safer rule*, because "capable of a more certain application, to hold that the one party "or the other has the *onus* of proof."

Note. What has always been the law is generally a safe guide, and the Judge is to be commended who adopts that as his standard.

Judge WALLACE then cites STORY, J., in Tidmarsh vs. Wash. Ins. Co., 4 Mason, 440, and CURTIS, J., in Bullard vs. Roger W. I. Co., 1 Curtis, 148, and says they are in direct antagonism, and he cites the English case of Pickup vs. T. & M. Ins. Co., L. R., 3 Q. B. D., 594, and adds:

"In the present case the jury were instructed that the burden of "proof was upon the defendant to show unseaworthiness. When it "appeared that the plaintiffs *had represented* that the vessel should "be repaired at New York, and no repairs had in fact been made, " * * * it then devolved upon them to *excuse* their non-com- "pliance. This they attempted to do by proof that the vessel was "seaworthy and *needed* no repairs.

"The plaintiff held the affirmative as to this.

"The manifest tendency of the instruction was to mislead the "jury.

"Had my attention been specifically directed on the trial to the "point now made, the instruction would *have been limited* to the "*issue* arising upon the implied warranty of seaworthiness."

New trial granted.

Note. So far as it goes, the result reached was right enough. What *would have been done* is of no importance, save as an expression of an opinion, obviously erroneous, that on the *issue* "was the "implied warranty of seaworthiness satisfied," which issue arose and could arise only on the *allegation* of seaworthiness by the plaintiff as a condition precedent to there being any contract of insurance, the defendant who *denied* must prove the denial.

Moores vs. Louisville Underwriters, 14 F. R., 226: Action on a *cargo* policy on a *raft of logs* to be towed, &c.

HAMMOND, J. (p. 230): "The reargument was asked on the "claim that, as matter of law, if the 'seaworthiness' at the incep- "tion of the risk be established by *proof* (as I hold it was) the *pre-* "*sumption* would be that the loss occurred by a peril of river navi- "gation, no matter whether the active agency causing it could be "descerned or not. This is a question about which I find there is "much conflict, and, to my mind, at least, great *confusion* of author- "ity and statement, some of which, I imagine, results from over- "looking an important distinction adverted to by Mr. Flanders be- "tween cases arising on bills of lading against the carrier for a vio-

" lation of his undertaking and those against an insurer for indem-
" nity under his contract. Flanders' Shipp., 183."

Note. See extract from Flanders on Shipping and comments thereon at page 24 of this brief.

See, also, Lawson on Carriers, § 153, p. 214.

* * * (p. 230.) The latest and best discussion of the question " I have found is in the case of Pickup vs. Thames Ins. Co., 3 Q. B. " D., 594. It is there adjudged that the *burden of proving* **un**sea-
" *worthiness is on the insurer, there* " being a *prima facie* **presump-
" tion of seaworthiness** *in favor of the assured.*"

No other authorities are cited.

Note. The difference between the insurance law of England and of the United States is pointed out at pages 74 to 84 of these points.

Judge HAMMOND (p. 234) continues :

" Technical difficulties about the '*burden of proof*,' and its shift-
" ing from one party to the other, are made plain by that case, and *if*
" we *observe* the distinction between the 'burden of proof' *as it ex-*
" *ists as a matter of pleading merely*, and as it is less technically
" applied to the exigencies created by the sometimes shifting force of
" the testimony, in respect to its imposing a *burden of further evi-*
" *dence*, on the one side or the other, to bring about that preponder-
" ance of probative value necessary to convince the mind of the
" *triers of the fact in issue*, these all vanish " * * *

(P. 234). " *But I do not base my judgment wholly on the above pre-*
" *sumption.*"

Note. Evidently Judge HAMMOND was too good a Judge to leave the case standing on such shaky ground.

Batchelder vs. Ins. Co., 30 F. R., 459. Insurance made February 27, 1884, on lumber on barge " Americus." On February 18th, after loading lumber, the barge, while anchored in a gale, dragged her anchors and grounded ; *i. e.*, before the insurance.

BUTLER, D. J. : " The *defense* set up to the policy is two-fold :
" *First*, that the barge was unseaworthy. * * * As respects the
" first, it must be conceded, I think, that the burden of proof is on
" the libellants.

" *Ordinarily, in such an issue this is otherwise.*

" But the facts stated in the libel respecting the first storm and
" grounding of the vessel are sufficient to *shift* the burden.

Cites no authorities.

Gery vs. Citizens' Mut. Ins. Co., 30 Fed. R., 695 (Alabama).

Toulmin, J.: " By the law of marine insurance there is an *im-*
" *plied* warranty in every insurance of a ship, and in every voyage
" policy, that the vessel shall be seaworthy, * * * and if she is
" not seaworthy for the voyage there is a breach of the implied
" warranty (1 Pritch. Adm. Dig., p. 987, § 1242; *Id.*, p. 988, § 1249)."

Note.—The Court cited only English authority and forgot to add that such warranty was a *condition precedent* to the policy attaching, and afforded *no ground of action by the insurance company*, but operated to prevent the contract from coming into existence. This is shown by the cases where the *premium* of insurance has been sued for, and recovery defeated by proof of the policy not attaching.

" It is held that breaches of warranty are matters of defense and
" must be pleaded by the insurer." * * * P. 696 : **" The ship**
" is prima facie to be deemed seaworthy."

1 Pritch. Adm. Dig., p. 994, § 1311.

Note.—An English authority again, and none other cited :

" Her unseaworthiness is a matter of *defense*, and it devolves
" upon the insurer to plead it, *and the* onus *is on him to prove* it "
(Id., p. 994, § 1308; *Id.*, p. 995, § 1313*)*.

Note.—Pritchard again, and only.

" *The law presumes the ship to be seaworthy* " * * * (2 Pritch-
ard Ad. Dig., p. 1591, § 1213).

Note.—More Pritchard.

Ward vs. China Mut. Ins. Co., 44 F. R., 43; LACOMBE, J

" Seaworthiness, however, is a matter of warranty on the part of
" the assured, and such warranty must be complied with to enable
" him to recover. *Such compliance must be pleaded by him*, or his
" complaint does not set forth facts sufficient to constitute a cause
" of action. * * * If compliance with the implied warranty of
" seaworthiness is sufficiently averred in the complaint, *issue* is
" joined thereon by the specific denial in the answer of every allega-
" tion contained in the fifth paragraph of the complaint.

" Of this issue the plaintiff holds the affirmative.
" It has been held in this Circuit (Lunt vs. Ins. Co., 6 F. R., 562)
" that upon the trial the plaintiff may rely *upon* a *presumption* to
" establish the affirmative of that issue and that he is not called
" upon *in limine*, to give evidence of his compliance with the
" warranty, *but that does not change the issue itself.* It is still
" one of which the defendant holds the *negative*."

LASTLY.

The damages found by the twenty-second finding (p. 16) were $9,175.40, and by the twenty-first finding (p. 16) the vessel arrived at Savannah January 27, 1884. Libellants should have a decree for the said damages, *with interest* from November 27, 1884, and costs of the District Court taxed $547.79 (pp. 7-*14*) and *interest* thereon from August 7, 1888, and the costs of the Circuit Court and of this Court to be taxed.

Dated December 13, 1893.

Respectfully submitted,

GEO. A. BLACK,
Of Counsel for Libellants,
44 Pine Street,
New York.

APPENDIX.

Dimensions, &c., of Schooner Edwin I. Morrison.

Built in 1873 (64).

Registered tonnage, 508 tons (64).

She was a three-masted schooner (23).

Length, 135 feet on keel, 155 feet over all (87).

Width, 32 feet 4 inches (64); 33 feet 6 inches (81).

Depth, 16 feet (31, 64).

Two decks; between decks 6 feet, lower hold 10 feet (42).

Poop-deck runs 30 feet forward of cabin (87), and to within two feet of mainmast (87).

Height of poop-deck above main deck, 4½ feet (13–88).

Cabin: deck, 23 feet long (87); is 3½ feet above poop-deck (85); has two entrances: the forward one with double doors and gang-way (87), and the one aft with single door (87); has a sky-light (87). The cabin commences 8 to 10 feet forward of taffrail (87).

Bulwarks 3 feet high (53).

Fly-rail on poop-deck, 1½ to 2 feet above the poop-deck; on stanchions (88).

Stanchions of bulwarks, 2½ to 3 feet apart (53).

Water way: log (31), yellow pine (31), 3½ inches above deck (32).

Scupper: lead pipe; three inches in diameter (30); goes through deck and waterway at an angle of 25 degrees, coming out on outside, and is about 18 inches long; (42).

Forecastle deck; three feet above main deck (31).

Galley and forecastle about amidships, three to four feet forward of mainmast (56).

Gallery door slides to port and is stopped by a little batten (56).

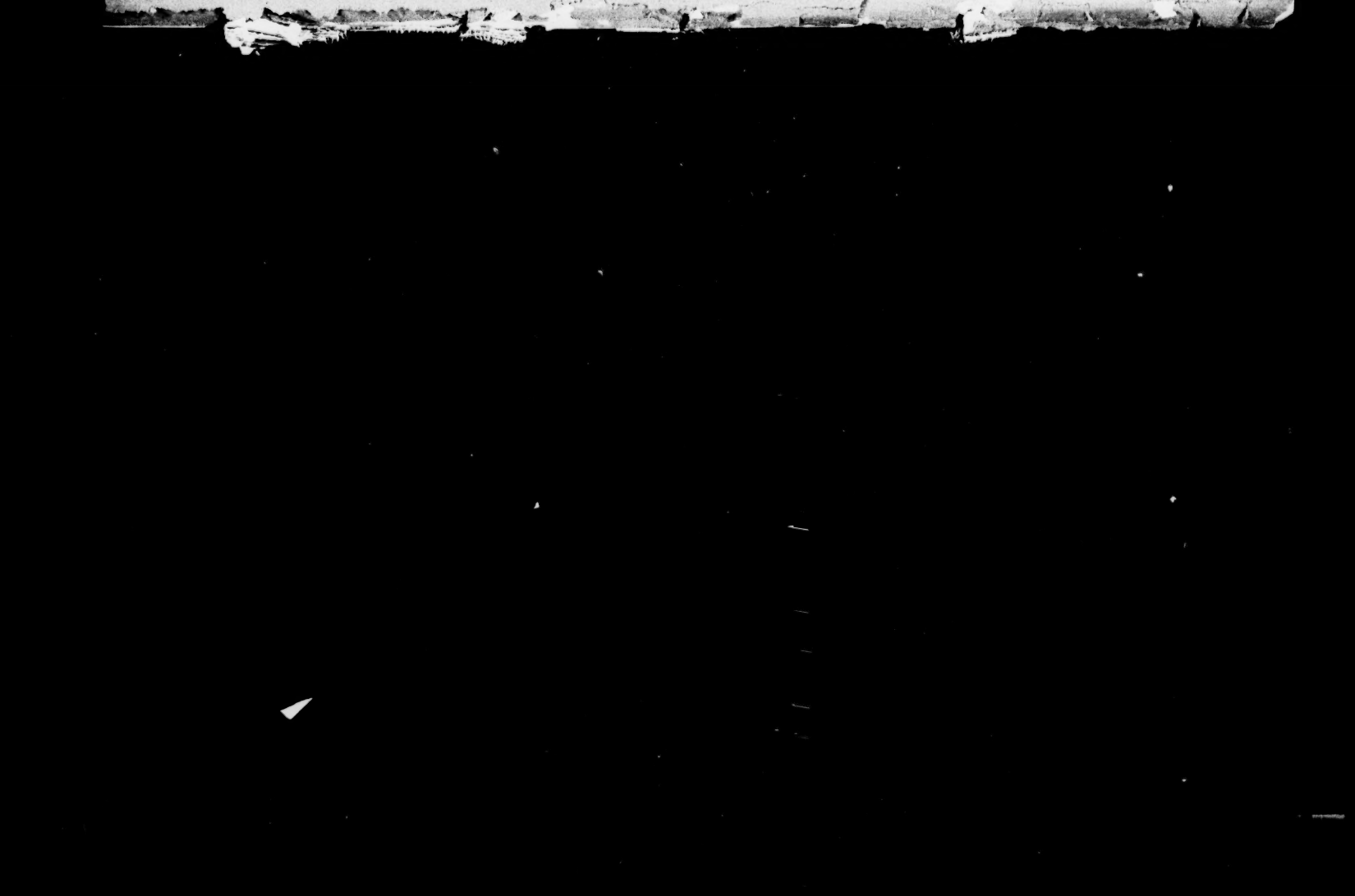
Mizzenmast comes just forward of cabin bulkhead (89).

Mainmast comes two feet forward of break of poop deck (87).

Bilge-pump plates ; are brass plates, four inches square with round hole three inches in diameter ; has four screw holes. One plate is on the main deck port side, between stanchions, close to bulwark and under the rail, and a few inches in front of the bulkhead of poop deck, and in the wake of port-opening (61), and just forward of scupper. One plate is on poop deck, starboard side, in water-way, two feet aft of break of poop deck (12, 7th Finding ; 13, 9th Fnding).

Pumps : diaphragm on poop deck (23) is the best (84) ; located 20 feet aft of amidships (23).

Two syphon pumps on main deck amidship (23, 49).



Office Supreme Court U. S.
FILED.
JAN 9 1894
JAMES H. McKENNEY,
CLERK.

153-199

Supreme Court of the United States.

No. 227.

THE BRADLEY FERTILIZER COMPANY,
Libellant and Appellant,

vs.

THE SCHOONER "EDWIN I. MORRISON," etc., STEPHE
S. LAVENDER *et al.*,
Claimants and Appel

BRIEF FOR APPELLEES.

GEO. BETHUNE ADAMS,
Of Counsel for Appellees.

That
"and
of the
2). S
about
side
bulwa
eter,
trodu

Supreme Court of the United States.

THE BRADLEY FERTILIZER COMPANY,
Libellant and Appellant,

against

The Schooner "EDWIN I. MORRISON," her tackle, &c., STEPHEN S. LAVENDER *et al.*,
Claimants and Appellees.

No. 227.
October Term, 1893.

Brief for Appellees.

Statement.

The schooner was chartered by libellant December 19, 1883, to carry a cargo of guano from Weymouth, Mass., to Savannah, Ga., the charter containing a stipulation that the vessel should be "tight, staunch and strong "and every way fitted for the voyage," and the dangers of the seas being "mutually excepted" (findings 1 and 2). She was a three-masted schooner, built in 1873, about 155 feet long over all (finding 6). On the port side of the vessel, in the water-way, and close to the bulwark, there was a hole about three inches in diameter, made when she was built for the purpose of introducing a hose pipe into her bilge to free her of any

water accumulated there. The water-way (of yellow pine) was about three and a half inches above the deck. The hole was a short distance in front of the poop and ran down through the water-way, between the ceiling and the skin of the ship. The hole was covered by a brass plate about four inches square, countersunk into the timber, flush with the top of the waterway, and fastened by four brass screws. In the brass plate was a removable cap, also of brass, intended to be unscrewed from the plate when the hole was to be used, but it had not, in fact, been used for four or five years (if, indeed, at all), and was painted over whenever the water-way was painted. The removable cap projected about three-eighths of an inch above the surface of the plate, the edges being beveled so as to leave not more than an eighth of an inch of perpendicular surface. There was a similar plate and cap on the starboard side of the vessel, but somewhat further aft and upon the poop deck (finding 7).

Such bilge-pump holes are not unusual in vessels constructed in some localities. The plates are generally considered permanent fixtures, not peculiarly susceptible to deterioration from age. Cut water-ways located as this was, well covered up and well painted, are not liable to rot, and their reasonable expectation of sound life is largely in excess of the age of this vessel. This mode of covering bilge-pump holes was generally deemed secure by seafaring men, and seldom, if ever, have any accidents arisen from their use (finding 8). The bilge-pump hole, heretofore described, was opposite a port in the bulwarks of the vessel. The opening of the port was about a foot square, beginning about two inches from the bulkhead of the poop deck. The poop deck was about four and a half feet above the main deck, and extended from just abaft the mainmast to the stern (finding 9).

Before the vessel sailed the cap and plate appeared to be in good order, with no indication of looseness. The examination which was at that time made of them consisted of such inspection as could be given by the eye, and to such an inspection they were from time to time subjected (finding 11). Such examination by a survey, without the use of special tests, unless there is some appearance of defect, is such as a reasonably prudent master or owner might be expected to give them in order to determine the seaworthiness of his vessel before beginning a voyage (finding 12).

The vessel went to sea January 7th, 1884, and on the same day encountered a gale, which increased in violence and lasted several days. The incidents of that storm, and the experience of the vessel while it prevailed, are set forth in detail in finding 13. The vessel was swept by heavy seas, planks were carried away from the bulwarks, together with one of the ports, the water-way on the starboard side was started, covers of the chain lockers, a spar, the forecastle door and galley door, coal, buckets, bucket racks and pieces of the bulwarks were dashed about the deck. Owing to the violence of the seas which were sweeping over the vessel, the men were unable to work at the pumps on the main deck, and it was with difficulty they could work the pump on the poop deck. The vessel shipped water through the cabin windows, doors and booby hatch. Previous to 4:30 o'clock on the morning of the 10th of January the men were able to get a suck on the pumps, which indicated there was no water in the well; but after that they were unable to do so. A bad sea was flooding the decks continually, and washing everything movable about. About five o'clock they sounded and found eighteen inches of water in the well. In about half an hour afterwards they wore ship, putting the vessel before the wind, so that the men could stand at the pumps.

This gave the vessel a list to port. The only outlets on the port side for the seas that came aboard were the open port above mentioned and the scuppers. They continued pumping, but still were unable to get a suck, and at nine o'clock soundings showed about seven feet of water in the vessel. Preparations were then made to abandon the vessel, as she was supposed to be sinking. The lashings of the boat upon the poop deck were cut, and the women on board came up from the cabin to take the boat. Between ten and eleven o'clock they wore ship and the vessel slowly righted up, the booms swinging from the port to the starboard side, bringing the port side out of the water. The vessel was then working heavily in the sea, losing steerage way and settling fast. When the vessel righted up and rolled her lee side out of the water, the second mate, who with others fastened with lines to prevent them from being washed away, was working at the pump on the main deck, heard a heavy gurgling sound, and let go the pump and went over to the port side, put his hand against the rail, and looked down under it to where the bilge-pump plate was, and saw a hole large enough to put his hand in. He ran his hand and arm down the hole and called to the captain, who came and found that the whole bilge-pump plate, with the screws, was gone (finding 13).

The wood to which the plate had been fastened looked white and sound. From the holes out of which the screws had come part of the clear wood was itself hauled, the splinters hanging around the edges of the holes, the holes thus presenting a ragged look. The screw-holes were not smooth, nor black, nor rusty. The wood of this particular water-way in the vicinity of the plate did not look rotten, and when after arrival at Savannah the temporary plugging hereafter described was removed, and the hole plugged and covered with

sheet-lead, the timber into which the plug was driven, and on which the lead was nailed, was found solid (finding 14).

The mate immediately tested the condition of the similar plate on the starboard side by tapping with a hammer and found it apparently sound (finding 11).

The hole was at once plugged up, covered with canvass, and sheet-lead nailed over the canvass (finding 17). At this time the wind had abated somewhat. The vessel's wheel was tied hard up and the sails trimmed so that she would lie to, and the crew went to work pumping again and gained on the water. By eleven or twelve o'clock that night they succeeded in getting her free of water, so far as the pumps could do so, and the voyage was continued (finding 18).

Afterwards it was found that the mainmast had been loosened by the working of the vessel, and that the coating was broken; also that a scupper on the starboard side was broken (finding 19).

The weather continued severe during almost the entire voyage, and the injury to cargo was increased thereby (finding 20).

The vessel arrived in Savannah on January 27th, 1884, and on delivering her cargo some of it was found to be damaged (findings 21 and 22).

The Court also found that as no one witnessed the removal of the bilge-pump plate, direct evidence of the cause was not obtainable, but that it was to be inferred from the facts proved that it was knocked out by something striking violently against it subsequently to the time when they wore ship after finding eighteen inches of water in the well, which would be between 5 A. M. and 5:30 A. M. (finding 17), that at the commencement of the voyage the vessel was tight, staunch and strong, and in every way fitted for the voyage, that there was no latent defect in the vessel which contributed to the damage to the cargo, that there was no fault or negligence

in the navigation of the vessel or care of the cargo, and that the whole of the damage was caused by a danger of the seas, and was within the exception in the charter and bills of lading (findings 23–26).

Point One.

The findings of the Circuit Court are conclusive as to the facts.

The argument made by appellant in its brief is a manifest attempt to obtain in this Court a review of the findings made by the Circuit Judge under the Act of 1875. The whole argument is such as would be appropriate before a Court of original jurisdiction on the trial of the cause, but is clearly out of place on this appeal. Much of the brief consists of arguments relating to portions of findings not excepted to, notably the 13th finding of fact, exceptions having been taken only to certain specified statements in that finding. It is an attempt to try the cause over again in the Supreme Court. This Court has repeatedly held that under the Act of 1875, it is only ultimate facts which the Circuit Court is bound to find, that refusals to find mere incidental facts, amounting only to evidence from which the ultimate fact is to be obtained, will not be noticed; but that if the Circuit Court refuses to make a finding, one way or the other, as to a material fact established by uncontradicted evidence, or if it finds such a fact when not supported by any evidence, this Court will review the rulings, provided exceptions are properly taken, and the questions are presented by bill of exceptions. The *E. A. Packer*, 140 U. S., 360; *The City of*

New York, 147 U. S. 72, and cases there cited. Appellant has taken twenty-one exceptions to findings and refusals to find. These exceptions will be considered *seriatim*, and it will be shown that no error has been committed by the Circuit Court.

The appellant has referred at great length to the original opinion of the District Judge upon which a decree was entered against the vessel. While the facts found therein are immaterial here, some allusion thereto seems appropriate in view of the appellant's brief.

Exception I.—The District Judge originally found that the vessel was loaded deeper than was prudent (p. 116, *199*), but he afterwards, in an opinion filed on the hearing of exceptions to the Commissioner's report, and of a motion for reargument, stated that he had erred in this respect (pp. 118, *203*). The portion of the finding which is not excepted to is to the same effect, substantially, as the portion to which the exception is taken. The whole finding is sustained by testimony at p. 42 (77), p. 44 (82), p. 63 (114, 115), p. 78 (141), p. 86 (154½).

Exception II.—The portion excepted to is supported by testimony at p. 53 (98); (and see p. 68, *123*, where libelant's counsel describes the cap as a "quarter of an inch" above the plate). The District Judge found substantially the same fact as the Circuit Judge (p. 115, *196*).

Exception III.—See p. 24 (47), p. 28 (55), p. 45 (82), p. 78 (141).

Exception IV.—See p. 29 (56), p. 31 (59), p. 32 (61), p. 47 (86), p. 53 (97).

Exception V.—See p. 46 (84–5), p. 76 (136).

Exception VI.—See p. 32 (60), p. 47 (87), pp. 51–52 (95), p. 76 (136, 137).

EXCEPTION VII.—See p. 23 (45, 46), p. 28 (54), p. 88 (158).

EXCEPTIONS VIII and IX.—The only question is whether the facts previously stated, and the whole testimony (e. g., p. 42, *78*, p. 57, *105*, p. 58, *107*, p. 111, *158-9*), afford any evidence whatever to sustain these inferences; and that they do is scarcely open to argument. No Court would entertain a motion to set aside the verdict of a jury rendered on such evidence; much less would this Court, under the principles above referred to, hold that such finding is erroneous when that can be done only in the absence of any evidence whatever in support of it.

EXCEPTIONS X and XI.—See opinions Circuit Judge, p. 120-121; also pp. 40-44 (75-82), p. 43 (79), pp. 44-45 (82-84), p. 73 (132); also finding of District Judge, p. 117 (200), that "she was a staunch vessel, and her be-" havior and recovery, notwithstanding she was on the " verge of sinking, are good evidence as to her generally " staunch character and good handling."

EXCEPTION XII.—The finding is a conclusion of fact abundantly sustained by the evidence. See also finding of the District Judge (p. 117, *200*), quoted under the last exception.

EXCEPTIONS XIII, XIV and XV.—The finding of fact and conclusions of law excepted to follow logically from the facts previously found.

EXCEPTION XVI.—The words which libellant claims should have been inserted were not only immaterial but were not in accordance with the facts. See p. 47 (86), p. 53 (98).

EXCEPTION XVII.—The amendment was immaterial,

and even if allowed the facts would in no respect change the result.

EXCEPTIONS XVIII and XIX.—These are fully covered by the opinion of the Circuit Judge (p 121), and the reasons he assigns for refusing the amendments are unanswerable.

EXCEPTION XX.—The words sought to be inserted—"specified in the 13th, 16th and 20th findings"—were immaterial; moreover, the Circuit Judge was entitled to base the finding not only on the facts previously found specifically, but on all the evidence in the case.

EXCEPTION XXI.—The proposed finding is certainly not an "ultimate fact" within the decisions of this Court. It is also to be said that some of the statements are in conflict with portions of finding VII not excepted to by libellant. She also p. 32 (61), p. 24 (47-48), p. 28 (55), pp. 40-41 (75-6), p. 49 (90-91).

EXCEPTION XXII.—The words were in substance already in the findings (findings VII and VIII, p. 12).

EXCEPTION XXIII.—The words were in substance already included in finding VIII.

EXCEPTION XXIV.—The statement in the finding is merely a guess, and the opinions of the witnesses questioned on the subject were in conflict (opinion of District Judge, p. 116, *199*). See also p. 42 (78), p. 58 (107), p. 60 (110), p 64 (116), p. 111 (188).

EXCEPTION XXV, XXVI, XXVII.—The proposed findings and conclusions were necessarily disallowed because the Court found the facts and law otherwise.

The District Judge, who found in favor of libellants, did so with considerable hesitation. He said: "Fully "appreciating the uncertainty and embarrassment that

"attends the case, I must allow judgment for the libel-"lants," &c. (p. 118, *202*). And although, in the same opinion, he says that he deems the testimony as to the severity of the gales and the amount of water on deck prior to the time the leak became serious, to be "somewhat exaggerated," he was clearly influenced to make that remark by his finding that the vessel was overloaded (p. 117, *200*); a finding which he afterwards distinctly and expressly revoked (p. 118, *203*). He also found that the cargo was considerably damaged by perils of the sea independently of the damage attributable to the loss of the plate. "I cannot doubt upon the evi-"dence, however, that from the considerable water that "was taken aboard and went down by the mast and in "other ways, the lower part of the cargo in the hold "must have been damaged to some extent by water "before the bilge plate was knocked off. Any such "damage is chargeable to sea perils, for which the "vessel is not answerable" (p. 119, *204*). He also found: "Such bilge-pump holes are not unusual in ves-"sels constructed in some localities, and seldom have "any accidents arisen from them. The mode of cover-"ing them, above described, was deemed perfectly "secure" (p. 115, *196*); and on the trial he remarked: "This is the way this vessel was built, and it can't be "claimed it was an unseaworthy mode of structure" (p. 34, *64*).

But it should be observed that important additional testimony was taken in the Circuit Court (p. 109, *113*), and that the findings were based in part on such evidence. R. G. F. Candage, a marine insurance surveyor, who had been a master mariner for many years, and whose business it was to examine vessels for the purpose of determining whether they were seaworthy, and who was familiar with the schooner in question, testified that the bilge-pump plates of the

Morrison were placed in the manner which was usual at the time she was built, and that they were regarded as permanent fixtures not requiring to be removed for examination ; that an inspection with the eye alone usually determines whether they are defective ; that he did not remember ever having unscrewed a plate when examining a vessel ; that such removal would have a tendency to weaken the fastenings ; that if the plate of the *Morrison* had been there for ten or eleven years, and never used or removed, and had been painted over from time to time with the ways, there would be no gradual weakening of the fastenings of the plate, and no examination would be necessary beyond that afforded by the eye (pp. 109–110). " I would not " deem any examination of the bilge-pump plate neces- " sary other than such examination that I would give to " the permanent part of the vessel. I don't think I " should be more particular than I should be with " the spars " (p. 112, *191*). The circumstances of the loss of the plate were detailed to him, and he was then asked to what he would attribute its loss. He answered : " In my opinion, to the fact that some hard " substance had been dashed against it by the force of " the waves and the rolling of the vessel. By waves I " mean the water on deck, or that which " might come over the vessel and find its " way to the lee side with great force, taking any- " thing in its way with it. I should have looked for " marks in the vicinty of the place where the plate was, " but if no marks had been there, I don't think it " would have changed my opinion as to—something " more solid than water had struck the plate and car- " ried it away. I don't think that the force of water " could have ripped that out and carried it away alone. " If some object had struck the plate it would not " necessarily have struck anything else in the vicinity.'

" I have seen a great many storms at sea. I have made " nine voyages around Cape Horn and other voyages " across the Atlantic. Water taken in a vessel must " find an outlet, of course, or else it would burst some- " thing away. In escaping from a vessel it escapes " with great force and carries anything with it with " equal force. It will fetch up with tremendous force, " and anything has to be very solid to stand it—that is. " such as bulwarks. The power is almost inconceivable " by one who has not witnessed it. I would not have " been very much surprised if I had not found the ob- " ject that knocked that plate out, for the port was be- " tween the two very stanchions between which this " pump was located, and any object that would have " carried away that plate would have gone overboard " with the same force of the wave that carried through " and overboard through the port-hole, provided it had " been small enough to go through. The loss of spars " and sails would not be necessary to prove that she had " encountered severe weather—it would corroborate it. " If there had been severe weather and no loss of spars " and sails, it would be evidence of good seamanship in " handling the vessel " (p. 111).

Point Two.

The question of seaworthiness was purely one of fact.

It was said in *Walsh* vs. *Washington Ins. Co.*, 32 N. Y., 427: " The jury having found for the plaintiff, and " the Court below having approved the finding upon the " facts, there would seem to be no serious question for " consideration here, in regard to the seaworthiness of

"the vessel; for it is agreed by all the authorities that "this is peculiarly a question of fact for the jury." And in 2 *Arnould Marine Ins.*, 667 (5th ed.): "The "whole question as to what amounts to seaworthiness "is peculiarly a question for a jury." See also *Moores* vs. *Louisville Underwriters*, 30 Fed. Rep., 226 (at p. 231).

The Circuit Judge not only found that the inference to be drawn from the testimony was that the plate had been knocked out by something striking violently against it (finding 16), but he further found that the vessel was tight, staunch and strong, and in every way fitted for the voyage, that there was no latent defect in her which contributed to the injury to the cargo, and that there was no fault or negligence in the navigation of the vessel or care of the cargo (findings 23, 24, 25). Appellant's counsel admits in his brief that the issue presented was of exemption by reason of sea perils (Applt's brief, p. 2). The facts in regard to this issue have been found against libellant, and it has been shown, under the last point, that not only is there "some evidence" to sustain them—which is all that is required in this Court—but that they are abundantly supported by testimony of the most cogent character. Appellant's counsel concedes that the only ground on which these findings can be assailed is that there is no evidence whatever to support them; but, under the guise of demonstrating such absence of testimony, he argues at great length that the burden of proof was on the vessel and that such burden was not met by it. Whatever the rule may be as to burden of proof in cases of this character, appellant's extended arguments as to the weight of testimony are out of place here. They were considered by the Court below. Under the decisions of this Court it is not necessary, nor would it be proper, for the appellees to examine the evidence in detail and

present anew the arguments which were urged on behalf of claimants in the Court below. The Act of 1875 was passed for the very purpose of relieving the Supreme Court of this burden.

Point Three.

The circumstances under which the plate was lost raised a presumption that it was caused by dangers of the seas.

Aside from the inferential finding of fact that the plate was knocked out by something striking violently against it, the same result would follow as a necessary conclusion from the facts which were directly testified to and found.

Bilge pump holes covered with such plates were not unusual, and their reasonable expectation of sound life was largely in excess of the age of this vessel. This mode of covering the holes was generally deemed secure by seafaring men, and seldom, if ever, had any accidents arisen from their use (8th finding). The District Judge found to the same effect (116, *198*).

Before commencing this voyage the vessel had been examined in the usual manner, and the plate seemed to be in good order (10th finding). The examination made was such as a reasonably prudent master or owner might be expected to give in order to determine the seaworthiness of his vessel (12th finding). At this time she was tight, staunch and strong, and in every way fitted for the contemplated voyage (23d finding).

Almost immediately after the commencement of the voyage, she encountered a storm of unprecedented violence, from the effect of which she took in eighteen

inches of water which came in contact with the cargo and soaked it to some extent directly, and by capillary attraction (119, 120).

While in this condition, the port then being the weather side, she wore ship. Just before this time the weather was very bad, a bad sea was flooding the decks continnually and washing everything moveable about. The covers of the chain locker and a spar were found loose in the morning, coal washed about decks, also buckets, racks, pieces of bulwark, the forecastle door and the galley door. The wearing of the ship gave her a list to port, and the only outlet on that side for the seas and wreckage, excepting the scuppers, was the open port opposite which the plate was located.

After she took in 5 or 6 feet more of water, the loss of the plate was discovered, and we will assume *arguendo* that this additional water was due to its loss.

It was then found that the wood where the plate was fastened was sound, that the screws in coming out had hauled part of the clear wood, leaving splinters hanging around the edges of the holes, the holes thus presenting a ragged look. The screw holes were not smooth, black or rusty.

Under these circumstances the authorities fully sustain the legal conclusion: "The damage is to be at-
" tributed to the dangers of the seas and not the fault
" the vessel" (16).

The language of the District Judge in *The Rover* (33 Fed. Rep., 515, 520), is quite appropriate. There the question was as to the unseaworthiness of a ship by reason of the breaking of her shaft. He said:

" A good shaft does not deteriorate with use. In a
" case of this kind, therefore, it is manifest that a shaft
" that has done good service for 11 years is presumably
" reasonably fit for service. Upon such proof the pre-
" sumption of fact is in favor of the shaft, and of the

"seaworthiness of the vessel in that respect; and when "the breakdown is shown to have occurred in a violent "gale, and in a heavy sea, the presumption must still "remain in favor of the ship, and the breakage ascribed "to the perils of the seas, unless the fact, not merely of "some trifling defect, but of some material and serious "flaw, is fairly established by the preponderance of "proof as the cause of the accident. *Lunt* vs. *Insurance* "Co., 6 Fed. Rep., 562, 568, and cases there cited."

While cases of insurance cannot always be relied upon as authorities in relation to contracts of carriage, they "help to show the meaning of the phrase, 'perils of the seas.'"

Carver on Carriage by Sea (1885 Ed.), p. 99, sec. 89.

"The damage to the upper works of the vessel is "frequently the subject of particular average, and "would be more frequently so, did not the amount of "this species of damage often come within one of the "exceptions of the policy. If any part of the upper "works is carried away, or broken in such a manner as "to make a specific injury, which is the proper subject "for repairs, it is always considered a loss within the "policy. * * * *"

"The same rule applies to the masts and spars. If "a mast is sprung, or if spars are carried away or "broken, the fact of their being so is usually considered "a sufficient proof of a degree of violence against which "the insurers undertake to make indemnity."

Phillips on Insurance, V. 1, p. 644.

"All loss or damage which a vessel or her cargo sus- "tains at sea owing to the extraordinary action of the "elements is attributable to perils of the seas." * *

* * "Damage to the ship by the violent action of "the winds and waves or to the cargo by water ad- "mitted into the hold through the straining of the ves- "sel in heavy weather, is likewise recoverable under "the same designation."

McArthur on Marine Ins., 110, 111.

"Another head of sea peril is damage suffered "through stress of weather, as by blows of the sea, "which carry away bulwarks, boats, deck houses and "the like, by losing masts and yards in a gale, spring- "ing a leak through violent straining, shifting of the "cargo, or becoming water-logged. The only difficulty "in such cases consists in distinguishing between sea "peril and wear and tear."

Lowndes on Marine Ins., 108–109.

"Damage done by the blow of the sea, as when a "sea shipped carries away bulwarks, boats, deck- "houses, or the like, frequent as such damage is, is in "no case treated as wear and tear."

Id., 185, par. 176.

"Of all the causes of loss enumerated in our com- "mon policies, the most frequent and important are "those comprised under the term 'Perils of the Seas.' "These words embrace all kinds of marine casualties, "such as shipwreck, foundering, stranding, &c. ; and "every species of damage to the ship or goods at sea "by the violent and immediate action of the wind and "waves, not comprehended in the ordinary wear and "tear of the voyage." * * * *

Arnould on Marine Ins. (5th Ed.) Vol. 2, p. 731.

"If a mast be sprung or spars snapped by the direct

"action of the wind, the fact itself proving the vio-
"lence to have been extraordinary; * * * those
"are instances of loss by perils of the sea, which con-
"sequently fall upon the insurer." .

Id., 708.

The only difference between the construction of the phrase in policies of insurance on the one hand, and charter parties and bills of lading on the other, is "that when a shipowner, who is bound, by the implied "terms of his contract, to carry with ordinary care, "claims the benefit of the exception, the Court will, if "necessary, go behind the proximate cause of damage, "for the purpose of ascertaining whether that cause "was brought into operation by the negligent act or "default of the shipowner or of those for whom he is "responsible."

Carver on Carriage by Sea (2d Ed.), p. 100.

In the case at bar, not only was there no evidence of negligence or default bringing the proximate cause of the damage into operation, but the facts absolutely excluded such negligence or default.

It was said by the District Judge, on the motion for rehearing, where it was suggested that the plate was probably knocked off by the locker cover or other wreckage: "If it had been knocked off in that way, "no doubt the vessel could not be expected to produce "direct proof of it by eye witnesses, but some marks "of violence adjacent should have been expected to at-"tend such a cause, and none were observed" (119).

The learned Judge ignored the immediately adjacent marks of violence shown by the forcible tearing of the screws of the plate from their places, and the consequent splintering of the sound wood in which they

were imbedded. Even he, however, was finally of the opinion that the plate had been "knocked off" (119, *204*).

The opinion of the Circuit Judge is much more logical and accordant with the law. He said :

"It only remains to determine what caused the loss "of the plate. There is no direct evidence on this "point ; only inferences to be drawn from known facts. "That it was knocked out of sound wood by a blow "from some floating article, which left no marks of vio- "lence upon the bulwarks or stanchions, because it was "swept overboard through the open port, is certainly "not impossible ; that the wood was rotten, or the "fastenings defective, seems disproved by the condi- "tion in which the holes were found. The vessel was "not originally unseaworthy, because she had bilge "pump holes covered as these were. The presumption "of continuing seaworthiness in respect to this part of "the ship is not rebutted by the single fact that no "special test was made as to their condition, in view of "the testimony (especially that taken in this Court), as "to what is the usual examination given to such struct- "ures. They are considered as permanent fixtures, are "located in the upper works, where they are almost "constantly in view, and are not liable to deterioration "from the lapse of time. Moreover, the evidence as "to the condition of the water-way and as to the torn "and ragged appearance of the holes, indicates that "they were reasonably fit to resist the ordinary shocks "and action of the sea, and were displaced by an acci- "dent of an extraordinary nature, and the application "of a degree of force which a reasonably skillful and "prudent owner would not have anticipated or guarded "against.

"There is no question of latent defect, the inference "to be drawn from the testimony being that there was

"no defect, patent or latent; that the fastenings were "sufficient, and were knocked out by a blow, such as "could not reasonably have been anticipated, and which "was caused by a danger of the sea." (120–121).

There can be no doubt that the vessel was in a reasonably fit condition to make a voyage to Savannah when she left Weymouth, and that, if she had not met with extraordinary weather, the plate would not have been knocked out, and she would have delivered her cargo without damage. Clearly, then, the burden of showing that the cap and plate were so made and fastened as not to be liable to be knocked off by any ordinary collisions, if there was such burden upon the claimants here, was amply met by the proof that it was a permanent part of the vessel, fastened in the usual way, looked after in the usual way, and knocked off in an extraordinary way under extraordinary conditions of weather. The mere fact of a plate being knocked off was an extraordinary incident, something not to be provided against by ordinary care.

Point Four.

The decree of the Circuit Court should be affirmed with costs.

Dated January 5th, 1894.

Respectfully submitted,

GEO. BETHUNE ADAMS,
Of Counsel for Appellees,
69 Wall Street,
New York City.

Office Supreme Court U. S.
FILED.
JAN 16 1894
JAMES H. McKENNEY,
CLERK.

227

153-199

Supreme Court of the United States.

THE BRADLEY FERTILIZER COMPANY,
Libellant and Appellant,

vs.

THE SCHOONER "EDWIN I. MORRISON,"
STEPHEN S. LAVENDER,
Claimants and Appellees.

LIBELLANT'S REPLY.

GEO. A. BLACK,
Of Counsel for Appellant.

C. G. Burgoyne, Walker and Centre Streets, New York.

" no defec

U. S. Supreme Court,

THE BRADLEY FERTILIZER COMPANY,
Libellant and Appellant,

VERSUS

THE SCHOONER "EDWIN I. MORRISON," STEPHEN S. LAVENDER ET AL.,
Claimants and Appellees.

LIBELLANT'S REPLY.

The claimants' first point is that libellant's argument "is a mani- "fest attempt to obtain in this Court a review of the findings made "by the Circuit Judge under the Act of 1875."

If this is seriously meant as an *accusation*, it fails of its point unless it be shown that such an attempt is wicked, either *malum per se*, or *malum prohibitum*.

The burden of showing the errors assigned by libellant rests on it, but it is entitled to a fair hearing, without the insinuation that it is doing wrong in asking for such a hearing.

While the Act of 1875 must be respected as the law, it stands accused by the very Judge who is now appealed from as "*An act to perpetuate injustice.*"

What are the "*ultimate*" facts of a case depends largely on the nature of the case.

In the **E. A. Packer,** 140 U. S., 364, this Court said: "The "Circuit Court is bound to find **every material** and ultimate "fact necessary to a proper determination of the question of liability. "* * * If a Circuit Court could find *as a fact* that a collision

" was due to the fault of one vessel, and *unless the finding set forth* " *all the material facts*, the ultimate finding of fault becomes more " or less a finding of fact, when it should be a legal **inference** " from other facts."

Where **inferences** are to be drawn from *circumstantial* facts, all that have the slightest bearing on the inference are material.

Comments on Claimants' Comments on Libellant's Exceptions (Claimant's Brief, p. 7).

I. Claimants say *the portion* of the V. finding, not excepted to, is to the *same effect, i. e.*, " that the vessel was not overloaded." This is a mistatement. The portion not excepted to is " *she was* " *accustomed to and able to carry that amount of cargo of the same* " *character at that season.*" This is not inconsistent with her being *overloaded*. It was the custom of claimants to *overload* her—and yet she got through, and so proved she was able to get through, but *how* long and often she would continue to get through and not break down was the problem (the Vesta, 6 F. R., 534) ; a *horse* may carry, and thereby show that he is able to carry, an *excessive* load, but that does not prove that it is not excessive—and when the horse breaks down, the expected result has been reached.

That the " Morrison " carried 850 tons of coal from New York to Boston (63), *a short coasting voyage with inland navigation most of the way and harbors of refuge every few miles*, is no test of her ability to make an *ocean* voyage around Cape Hatteras even with a like cargo ; besides coal and guano, are different articles to carry (see Brett, p. 64, *116*) *guano* is a " hard cargo to carry," Cahoon (47, *87*) " *a dead weight cargo—no life in it*," Candage (113, *193*).

II. A reference by libellant's counsel to Cahoon's " *probabilities*" about the cap being " two-eighths " of an inch above the plate (53, *98*) is *distorted* into a statement that " *libellants' counsel describes* " *the cap as a quarter of an inch above the plate.*" Libellant's counsel in asking a question (68, *123*) about the cap, and referring to the " two-eighths " of Cahoon, said : " Which is *described* as being " a quarter of an inch above the level of the plate " (68, *123*).

It is unfortunate for claimants' cause that their counsel has to indulge in misstatements to support it.

III. The " *appearance* of good order " in the plate to those who merely looked at its outside is not *evidence* of good order, or that

there was "no *indication* of looseness." What "*indication*" of looseness *in the hold of the screws* could looking at the plate develop? Tapping with a hammer would have been a test, but it was not adopted (XI. Finding, p. 13) or unscrewing the cap (Candage, 113).

IV., V., VI. and VII. Because on his direct examination the witness indulges in generalities, which, when sifted by a cross-examination show that he is speaking of a *later* occasion, *the easy way to show that the proof the claimant needs is there, is to ignore the cross-examination.*

This is the course claimant's counsel has adopted (see pp. 36 to 67 of my brief and Bourke vs. Davis, 44 Ch. D., 123).

VIII. and IX. The claimant's counsel argues that "the only "question is whether the facts previously stated and the whole "testimony *afford any evidence whatever to sustain these* **infer-"ences."**

Paddy was shipped as a raw hand, and went on the lookout for the first time. He saw a red and green light right ahead, and hailed the mate: "Mister Mate, I see a red and green light right ahead, "and if you don't look out you will run right into the apothecary's "shop."

As has been shown, the proper inference is to be drawn from *all* the facts—and this is a mixed question of law and fact (see pages 14 to 21 of my brief).

The reference to the verdict of a jury is unfortunate. The similitude to a *special* verdict where *all* the facts are stated is more appropriate, and *then* the question of whether the *correct inference* has been drawn from circumstantial facts is always open.

Mumford vs. Wardell, 6 Wall., 423.
The City of New York, 146 U. S., 76.

X. and XI. The vessel was not tight, staunch and strong *if* the bilge-pump plate was not secure; and there was a latent defect *if* this insecurity was hidden. That the plate got loose, when such plates do not ordinarily get loose, showed a defect or raised a suspicion of a defect which it behooved the claimants to proove did not exist by showing the actual condition of the screws and their sufficiency, and this claimants failed to show. The burden was on claimants and this burden they have not carried.

XII. The proof that *water* was allowed to reach the cargo through the *plug hole* in the cabin floor, or through the open seams

of that floor, showed that the cargo was not properly cared for. If the water which entered the cabin *had to flow out* in that manner the cargo ought not to have been stowed below it (see p. 57 of my brief).

XVI. "No part of said vessel was missing" was the libellant's request (see IV.) *(b)*, and this is the proof *at the time the bilge-pump plate was lost.* The trifling loss of a few bits of broken bulwark and of broken bucket racks did not occur until *after* the vessel got so deep that every little sea washed over her (Cahoon 54, *99* ; see pp. 41 to 47 of my brief).

XVII. That the vessel lost no sails or spars and made no repairs on arrival at her port, demonstrates that she was not in such heavy weather as described by her witnesses, and is a fact from which the error of the *inferences* drawn would appear (see pp. 19 and 70 of my brief).

XVIII. The difference between "*apparently*" and *really* tight staunch and strong seems immaterial to claimant's counsel.

When Judge LACOMBE, at page 121, says that if he should so amend, this Court might infer "that the *claimant* did not convince "the Circuit Court, *as a matter of fact*, that the vessel was tight," &c., he inadvertently stated the proposition of the *burden of proof* in a correct form, but he accepted as *convincing* very insufficient proof, viz., "the presumption of continuing seaworthiness" (p. 120).

XX. The general XXVI. finding that "the whole of the said "damage to cargo was caused by a danger of the seas," is open to the criticism of the E. A. Packer, 140 U. S., 364, above quoted, and libellant was entitled to the restriction proposed by it (see IX. Request, p. 18, and XX. Exception, p. 21).

XXI. The distinction between a fact proved and a fact *inferred* is lost sight of by claimant's counsel, and hence his mistaken view of the new 27th finding requested (see IX. Request, p. 18).

XXII. The claimant's concession that the requested finding that the screws "were liable to corrosion and injury from the lapse of time" was *in substance* found in the VIII. finding in the words, "Verdi-"gris sometimes forms around brass screws, thus weakening their "hold of the wood," is satisfactory to libellants, if it is to this Court.

XXIV. There is no *guess* in the libellant's evidence on this point. See the *shipwrights* Rosevelt (33, *64*), Lawrence (35, *67*), Willetsen (39, *73*). Atwood, cited by claimant at pages 42, *78*, says nothing about it, and while Thurlow, the *shipchandler*, at pages 58,

107, says it would "take the screws out," but on cross-examination at page 61 he says: "I *think* you would find a dozen came out "where you would find one break off. Q. You have never done it? "A. *I think I have.* Q. With brass screws? A. I *think so; I* "*am under that* **impression."**

Brett (64, *116)* says nothing about the screws, nor does Candage (111, *188).*

Page 10. The District Judge is quoted as to water "going down *by the mast,*" &c., but it is shown by the log that this was on January 15 (see p. 61 of my brief).

Page 10 (foot). Candage is cited: He says he "*has known of* "*decayed waterways where the plank-sheer and covering board were* "*all in one*" (112), while Thurlow had "never found a covering "board rotten in his life" (pp. 58, 107); and Candage says (113) unscrewing would enable him to determine the condition of the wood *slightly* better, and he has (110, *187*) sometimes examined them by unscrewing, and (at 112) by taking *hold* of the cap you can judge of the firmness of the plate.

Comments on Claimant's Point Two.

The criticism made is that libellant's counsel "argues at great "length that the burden of proof was on the vessel, and that such "burden was not met by it."

As no attempt is made to refute this argument, it may be assumed that it is convincing, even to claimant's counsel.

Comments on Claimant's Point Three.

P. 15. The "Rover" is cited, and, if wood did not rot nor brass screws become corroded with verdigris, it might be an authority.

P. 16. All claimant's references to parts of a vessel which are exposed to being carried away, are irrelevant in the face of the VIII. finding as to the bilge-pump plate—viz., "seldom, *if ever*, "have any accidents arisen from their use" (Candage, 112).

Owners' Liability for Latent Defects.

3 Kent's Com., *205. " *By the contract* the owner is bound to " see that the ship be seaworthy, which means that she must be " tight, staunch and strong, well furnished, manned, victualled, and " in all respects equipped in the usual manner for the merchant " service in such a trade. The ship must be fit and competent for " the sort of cargo and the particular service for which she is en- " gaged. *If there be a latent defect in the vessel, unknown to the " owner and undiscoverable upon examination, yet the better opinion " is that the owner must answer for the damage occasioned by the " defect.* It is an implied warranty in the contract that the ship be " sufficient for the voyage, and the owner, *like a common carrier*, is " an insurer against everything but the excepted perils."

" *(b)* Valin Com. Ord. de la Mar. III., 3. tit. Du Fret, Art. 12, " Vol. I., 653. **Valin** says (and in this he agrees with the English " law) that the owner is answerable on his contract for latent de- " fects, even though the ship had been previously visited by ex- " perienced shipwrights and defects had escaped detection."

Valin's Commentarie Sur L'Ordonnance de la Marine.

Liv. III., Tit. III., Du Fret., Art. XII., Vol. I., page 654 :

" La garantie du proprietaire du navire, ou la fin de non-recevoir " contre l'assuré, auriot lieu tout de meme, quoique le navire avant " son départ auriot été visité et jugé en état de faire le voyage, dès " que par événement il seroit vérifié que par des vices cachés il " n'étoit plus navigable; c'èst à-dire, s'il étoit constaté qu'il avoit des " membres pourris, casses ou tellement gâtés qu'il fût réellement " hors d'état de résitér aux accidens ordinaires des coups de vent et " des coups de mer, inévitables en toute navigation. La raison est " que la visite d'un navire à son départ, ne porte que sur ses parties " extérieures, parce qu'on ne le dévegre pas, au moyen de quoi elle " ne peut découvrir les vices intérieurs et cachés, dont par consé- " quent le propriétaire ou le maitre demeure toujours responsable, " et cela avec d'autant plus de justice qu'il ne peut pas ignorer le " mauvais état du navire : mais quand il l'ignoreroit, il en seroit " de même, étant nécessairement tenu de le fournir bon et capable de " faire voyage."

Translation.

The warranty of the ship owner, or the plea in bar against the assured, will have place all the same, although the ship before her departure has been visited and judged in condition to make the voyage, as soon as by the result it shall be demonstrated that by *hidden* defects she was no longer navigable; that is to say, if it was proved that she had parts rotten or broken, or so spoiled that she was really unfit to resist the ordinary accidents of winds and waves, inevitable in all navigation. The reason is that the *visite* of a ship at her departure only applies to her exterior parts, because they *(ne le devegre pas)* do not remove her planking; in consequence of which it *(la visite)* cannot discover the interior and hidden defects, for which, consequently, the owner or master (of the ship) remains always responsible—and that with all the more justice that he cannot be ignorant of the bad condition of the ship, but, even if he was ignorant, he would be responsible just the same, being necessarily held to furnish her good and capable of making the voyage.

January 13th, 1894.

Respectfully submitted,

GEO. A. BLACK,

Of Counsel for Libellant.

Caledonia. 43 F. R 685

C. C. of Ap. Isaacs J.